

M^R. J. M. CLARK K.C.

In the Privy Council.

No. 18 of 1910.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE FLORENCE MINING COMPANY, LIMITED (*Plaintiffs*).
Appellants.

AND

THE COBALT LAKE MINING COMPANY, LIMITED (*Defendants*).
Respondents.

APPELLANTS' CASE.

RESPONDENTS' CASE.

RECORD OF PROCEEDINGS.

LAWRENCE JONES & Co.,
4, St. Mary Axe, E.C.,
Solicitors for Appellants.

CHARLES RUSSELL & Co.,
37, Norfolk Street, Strand,
Solicitors for Respondents.

1936 fish survey

Colville Lake April
Discovery
Suspension

Less than 100 acres in
Rec 16
Everything ready to
Presentations p59

auto explore " after 11 a.m.
p10

Order of Argument

1. Opening
- 2 Short & concise statement of facts
 - (a) General Inquiries
 - (b) Map & Pamphlet explaining fully, giving

OC 15 Aug 1905	Rec p72
Reply 13 July 1905	Rec p70
OC 14 Aug 1905 -	Rec p79
OC 28 Aug " - -	p79
OC 30 Oct "	79, 80

Rec 50 (c) Conclusion that defendant acted upon Rec 50
R 51 (d) Work begun.

(e) Admin. work carried on from
1st Feb to 6th Mar without license

plus p10
para 39 & 40 (f) Exploration after license

(g) Discovery 7th Mar. b.

(h) Green license at time of discovery

(i) stating

(k) survey.

(l) Tender of claim

(m) Refusal on ground of instructions
+ refusing to forward

(n) Unsuccessful attempts to cure
loss duration

(o) Act of 1906 (14 May)

Dismissed on a few reasons.

b14 - mental with best cause

2. (2) Protest
(3) Sale to Rustts
(4) Mails to Rustts
(5) Action proceeded with
(6) after set down for Trial
Act of 1907 passed
(7) Rustts. consent in staying trial
adjourned pending decision of Govt
(8) Disallowance refused (Reasons)
(9) Trial before Reddell J.
(10) Court of Appeal
+ are ready for trial.

3. What is open

(4) Discovery from statutory right
(5) Statute of 1906
(6) Patent to Rustts void
(7) " " .. does not
carry Previous Metals
(8) Statute of 1907 Private Act
(9) Proper Interpretation
(10) Ultra Vires

Sec 33 of Mines Act applied to in
judg't of Mass C.J. V p 123
was upheld by Mines Act 1906
in para 57⁵⁸ of appellants case
Note that Sec 33 of Mines Act 1906
refers to 4. cause holder being
entitled to certificate of
decision

Sec 79. 1st of Mines Act 1906 refers to Sec
Sec 83. that when lands with
(words of old Sec 33) lands are
to be put in spl. m. D
Sec 98 refers to withdrawal but
gives no power of sale
Sec 99 that lands withdrawn may be
reopened (1) on terms & conditions of Act
(2) other terms & conditions as
may be provided by legislature
Sec 100 (applied to 4. Mass Act)



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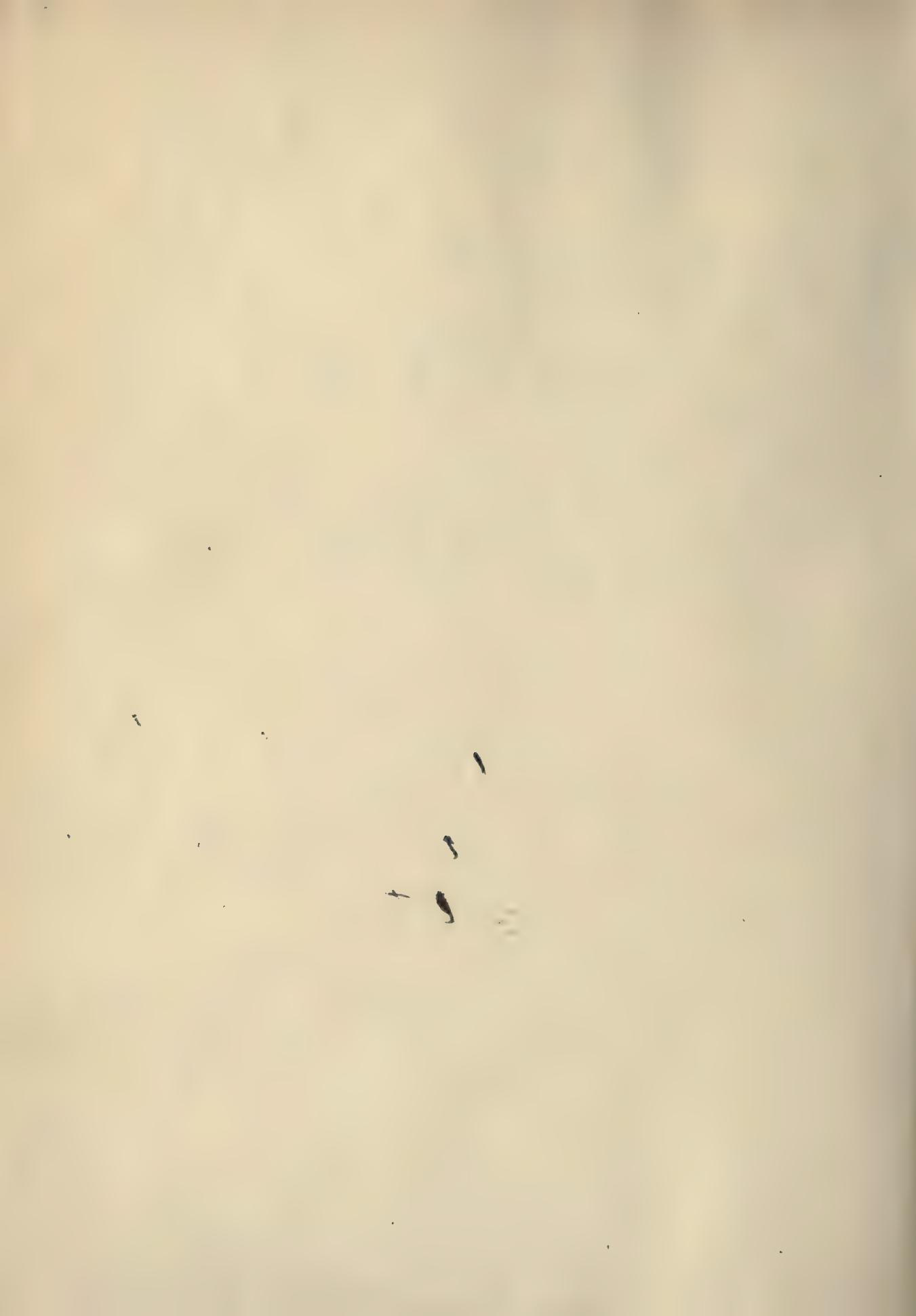
as to jurisdiction of local legislature
to limit appeal to Queen in Council
In Lushring & Dupuy 5 A.C. 409

Note distinction of this by
Lord Rockingham

also in Leonis & Marois

(1862) 15 Mo. P.C. (188)

Butty Prerog of Crown 25
jurisdiction of Judicature of P.C.
3 & 4 Will IV (1833) ch 41.



Point is that when prosecution
was launched appellant had
the right to leave at determined
in Canada by federally appointed
judges under Sec 96 of the BNA Act
subject to right of appeal to your
Honourships
Nature of this right was discussed by
Lord Brougham

In re Will of W. Matua 1908 A.C. 448.
read from p 450.

Also Crown Grain Ltd v H.H. Day 1908 A.C. 507
read Lord Brougham p 507

Province has no right to interfere
with rights in litigation

as to right to leave
Chancery Court v Pippett 1907 A.C. 312

In the Privy Council:

No. 13 for 1910.

Appeal from the Court of Appeal for Ontario.

BETWEEN

THE FLORENCE MINING COMPANY (LIMITED),
APPELLANTS;

AND

THE COBALT LAKE MINING COMPANY (LIMITED),
RESPONDENTS.

10

CASE OF APPELLANTS.

RECORD.

1. This action was commenced in the High Court of Justice for Ontario on the 29th day of December, 1906, by the appellants against the respondents, for (1) a declaration that the Letters Patent to the respondents were issued erroneously, by mistake and improvidently and are utterly void as against the appellants and that the appellants are entitled to the lands and minerals in question herein, (2) a declaration that the respondents rights, if any, under the said Letters Patent are subject to the appellants said right, (3) an injunction restraining the respondents, their servants, workmen or agents from extracting or removing any ore or minerals from mining claim J.S. 71, or from in any way interfering with the appellants' exclusive right to possession thereof, (4) an account of all ore or minerals that may be extracted or removed from the said lands or any part thereof, (5) a judgment setting aside as ultra vires or void the Letters Patent in favor of the respondents as against the appellants, or in the alternative confining the operation thereof to the lands therein described other than the lands of the appellants.

P. 2, l. 2.

P. 4, l. 30.

P. 4, l. 35.

P. 4, l. 37.

P. 4, l. 41.

P. 4, l. 43.

20 2. The action was tried before the Honorable Mr. Justice Riddell on the 9th, 10th and 11th days of June, 1908, who reserved judgment. On the 15th of June following the learned Trial Judge made certain findings of fact, not necessary to be here set forth in full, but including that the applicant "went to the proper office and procured such information as satisfied him that Cobalt Lake was open for prospecting." "No reason for doubting the good faith of Green or any of those through whom plain-

P. 103, l. 2.

P. 99 *et seq.*

P. 99, l. 20.

P. 99, l. 22.

P. 100, l. 27.

RECORD.

P. 99, l. 30.

P. 100, l. 31

P. 99, l. 28.

P. 102, l. 4.

P. 102, l. 2.

P. 102, l. 17.

tiffs claim," "that all legitimate means were used by the plaintiffs" and generally that the evidence of the plaintiffs engineer "should be given full credence throughout." Also that against the protests of the plaintiffs the Crown sold in fee simple the bed of Cobalt Lake for a large sum to the defendants without any discovery by or for them and that the defendants had full notice and knowledge of the claim of the plaintiffs. The territory so granted included the area in which the diamond drill by which was made the discovery (under which the appellants claim) of what the learned Trial Judge in his Reasons for Judgment described as a "valuable silver vein." The appellants contended and contend that upon the facts as proved the appellants were entitled to succeed but the learned Trial Judge, however, held that the Acts of the Legislature to which he referred barred the claim of the plaintiffs and that "the prohibition 'Thou Shalt not Steal' has no legal force upon the sovereign body" as he held the Legislature to be and also that within its jurisdiction it "is restrained by no rule human or divine." Judgment was accordingly entered dismissing the action with costs incurred subsequent to the 20th day of April, 1907, the date of the passing of the second Act, 7 Edward VII., Chapter 15. 10

3. The appellants gave notice of appeal to the Divisional Court of the High Court of Justice, but upon order of the Chief Justice of Ontario dated 5th day of November, 1908, special leave was given to appeal direct to the Court of Appeal for Ontario from the said judgment. The said appeal was argued before the Court of Appeal for Ontario, three of the five Judges sitting, on the 5th and 8th days of February, 1909, and judgment was reserved. 20

4. Judgment was given by the Court of Appeal on the 5th day of April, 1909, dismissing the appeal.

5. The Attorney-General of the Province of Ontario was represented by counsel at the trial and before the Court of Appeal.

6. On the 8th day of October, 1909, an order was made permitting the appellants to appeal therefrom to His Majesty in Council. 30

7. The property in question is the mining claim of 20 acres known as J.S. 71, being part of the bed of Cobalt Lake in the Township of Coleman in the Province of Ontario, and the mineral rights in the adjoining road allowance.

8. The said Township of Coleman was set aside by Order-in-Council, dated the 30th day of October, 1905, as a separate Mining Division known as the Coleman Mining Division. The said Order-in-Council was published in the Ontario Gazette on the 4th day of November, 1905.

9. The lands in question were included among the lands which under section 109 of the British North America Act belonged to the Province of Ontario, and by section 92, ss. 5 of the British North America Act, 1867, the legislature was empowered to make laws in relation to the management and sale of the public lands belonging to the Province. 40

P. 79, l. 35 *et seq.*

10. Pursuant to this authority there were passed "The Public Lands Act," now R.S.O. 1897, Chapter 28, "The Free Grants and Homesteads Act," R.S.O. 1897, Chapter 29 and "The Mines Act," R.S.O. 1897, Chapter 36, which with the amendments hereinafter set forth were in force at the time the rights of the appellants in question arose.

RECORD.

P. 123, l. 28.

11. As the alleged patent to the respondents is justified by the Court of Appeal under Sec. 33 of said "The Mines Act" which however had been previously repealed on the 14th May, 1906, by "The Mines Act, 1906" (6 Edward VII., cap. 11), it is not necessary to discuss "The Public Lands Act" or "The Free Grants and Homesteads Act" beyond pointing out that neither authorized the alleged sale to the respondents in November and December, 1906, or the said Patent which is dated 15th January, 1907.

12. Under "The Mines Act" (R.S.O. 1897, cap. 36), above referred to, mineral lands were divided into two classes, those situated in a mining division and those not in a mining division. By the section 9 of said Act mineral lands not in a mining division were to be dealt with under the system of mining locations, while those in a mining division were to be dealt with by a system of mining claims under miners' licenses. The words 20 of sub-section 2 of said Section 9 are "where such Crown lands are situated within a mining division they may be occupied and worked as mining claims under miners' licenses as hereinafter provided."

13. Sub-section 44 of the same Act authorized the Lieutenant-Governor in Council to declare any tract of country to be a mining division and to alter or diminish the limits of the division. The interpretation section, namely ss. 3 of Sec. 2 defined a mining division to include any tract of country declared to be a mining division within the Act. Section 44 provided that after "publication in the Ontario Gazette of an Order-in-Council declaring a tract of country to be a mining division, the mining 30 division therein mentioned and described and all mines on Crown Lands situate in the division shall be subject to the provisions of this Act and to any regulations to be made under this Act." "Crown Lands" were defined by section 2 sub-section 4 of the said "The Mines Act" (R.S.O. 1897, Chapter 36) and "Mine" by sub-section 1 of section 2; the lands in question being (as will subsequently appear) clearly Crown lands within the meaning of the said definition.

14. The sections following deal with the issue of Miners' Licenses but as the license of the discoverer, Exhibit 10, and of the appellants, Exhibit 12, were proved, it is not necessary here to discuss these provisions more in detail.

P. 81.

P. 85.

15. Section 47 of "The Mines Act" (R.S.O. 1897, Cap. 36) was amended by 61 Victoria (Ontario) Chapter 11, Section 3, to provide that "a licensee who discovers a vein lode or other deposit of ore or minerals in place within the division mentioned in his license shall have the right to stake out thereon a mining claim provided that it is on Crown Lands

not withdrawn from location or exploration and is not included in a claim occupied by another licensee or on lands, the mines, minerals and mining rights whereof have been reserved by the Crown and shall have the right to work the same or to transfer his interest therein to another licensee."

RECORD.

P. 59, 1. 25.

Pp. 79 and 80.

16. In the present case it was proved that the Licensee who transferred his interest to the appellants made a discovery within the meaning of the said section and that all the conditions were fulfilled and the appellants submit that thereupon the statutory right as defined by the Act vested in the discoverer and was duly transferred to the appellants. 10

17. The question as to whether the territory in dispute was open for exploration at the time of the discovery under which the appellants claim, namely, the 7th of March, 1906, depends upon the proper construction and legal effect of the three Orders-in-Council of 14th August, 1905, 28th August, 1905, and 30th October, 1905. Section 33 of "The Mines Act" (R.S.O. 1897, cap. 36) provided that where a part or section of the Province is shewn or reported to be rich in ores or minerals, the Lieutenant-Governor in Council may withdraw the whole or a portion thereof from sale or lease, etc., and may fix the price per acre at any greater sum than is hereinbefore provided or may offer the same at public auction on such terms and conditions as may be fixed by Order-in-Council. There is also an implied right to withdraw contained in section 9 of the Mines Act limiting the right of exploration which up to the time of the amendment authorized by 60 Victoria, Chapter 8, Section 5, had been absolute over Crown Lands. This limitation is expressed in the words of section 9 "except on such lands as may by the Lieutenant-Governor in Council have been withdrawn from sale, location or exploration as being valuable for their pine timber or any other reason," and a penalty is imposed for exploring on lands so withdrawn. The previous right of exploration under the Statute of 1892, 55 Victoria (Ontario) Chapter 9, Section 7, provided that any person might explore for mines and minerals on any Crown Lands surveyed or unsurveyed and not for the time being marked or staked out and occupied as provided in the Act. By "The Mines Act" (R.S.O. 1897, Cap. 36), Sec. 2, sub-section 4, "Crown Lands shall include all Crown lands, School lands or Clergy lands not in the actual use or occupation of the Crown or of any public Department of the Government of the Dominion of Canada or of this Province or of any officer or servant thereof, and not under lease or license of occupation from the Crown or the Commissioner of Crown Lands and as to which no adverse claim exists which is subsequently recognized by the Commissioner of Crown Lands." As there was at this time no adverse claim which was subsequently recognized it is clear that the phrase "Crown Lands" under this interpretation includes the lands in question and it is to be noted that in this definition of Crown Lands there is no reference to lands withdrawn. 20 30 40

P. 13, 1. 8.
P. 13, 1. 25.

18. The copy of the regulations contained in the official pamphlet handed Mr. Green, the discoverer, through whom the appellants claim, shows the position as to exploring on the territory in question subsequent to the Order-in-Council of the 30th of October, 1905, copy of which was included in the pamphlet handed Mr. Green. RECORD.
P. 72 *et seq.*
P. 72, l. 4.

19. It is to be observed that the regulations furnished Mr. Green by the Department contained as section 15 thereof the provision that a Miners' License shall authorize a Licensee to explore any portion of the Mining Division named in his license and to mine within one year from the date of the license on any mining claim marked or staked out by P. 73, l. 7 *et seq.*
10 such licensee on Crown Lands.

20. The provision authorizing the Licensee to explore on any portion of the Mining Division named in his license was inserted by force of 61 Victoria (Ontario) 1898, Chapter 11, Section 2. P. 79, l. 2.

21. Under section 7 of "The Mines Act" (R.S.O. 1897, Ch. 36), the provisions of the said Order-in-Council of 30th October, 1905, after publication in the Ontario Gazette (i.e. after 4th November, 1905) were to have the force and effect of law. P. 80, l. 4.

22. The only exception referred to in the Order-in-Council of 30th October, 1905, are in the words "not theretofore disposed of." This refers back to the Order-in-Council of 28th August, 1905, which provides for cases of sale or leases and for applications for making lands, all of which were protected. So, it is submitted, it is quite clear that on the 7th March, 1906, there was the right to explore on any part of the Coleman Mining Division which is mentioned in the license of the discoverer with certain exceptions which clearly do not include the lands in question, in other words that at the time of the discovery under which the appellants claim there was a clear right vested in said licensee to explore the part of the bed of Cobalt Lake now in question. The said pamphlet and the information given Mr. Green were represented by those in P. 79, l. 27.
P. 79, l. 30.
P. 51, l. 1.
30 charge of the Government offices to be complete and there was nothing in them directly or by reference casting the slightest doubt upon the right of the licensee to explore the property in question.

23. The Order-in-Council of 14th August, 1905, was based on the reason, expressed therein, namely that "considering the importance of the subject and the desirability of exercising careful judgment in arriving at a conclusion with reference to the adoption of a scheme or system of dealing with the mining question," the Committee of Council advised that the tract known as the Gillies Timber Limit, also the Lakes known as Cobalt and Kerr Lakes situated in the Township of Coleman P. 79, l. 7.
40 be withdrawn.

The careful judgment referred to in this Order-in-Council was presumably expressed a fortnight later in the Order-in-Council of the 28th August, 1905, which recited that the Township of Coleman and three other Townships therein named were shown to be rich in ores and min- P. 79, l. 22.

RECORD.

P. 79, l. 29.

erals and recommended that they be withdrawn and also be set apart under section 33 of "The Mines Act." Section 33 gave the Government under the recitals in the Order-in-Council of 28th August, 1905, the right to increase the price of the lands therein described. As the whole of the Township of Coleman (except what is expressly excepted as having been sold, leased or applied for) was set apart under the Order-in-Council of 28th August, 1905, under said section 33 of the Mines Act, and as the whole of Cobalt Lake is situate within Coleman Township it is clear that this Order-in-Council necessarily applies to Cobalt Lake.

24. Cobalt Lake being part of the Township of Coleman is included 10 in the Order-in-Council of 30th October, 1905, and after publication thereof in the Ontario Gazette on the 4th November, 1905, the terms of the Act are clear that the land in question as part of the said Township of Coleman was to be dealt with on the basis of section 47 of "The Mines Act," giving the licensee who makes a discovery a statutory right to work his mining claim.

It is shown that the said Order-in-Council of 30th October, 1905, remained in force so that the above represents the legal position at the time the rights of the appellants became vested.

25. These rights arose in the following way: Early in 1906 Mr. W. 20 J. Green who transferred his mining claim to the appellants decided to prospect for minerals in Cobalt Lake. He went to the Parliament Buildings at Toronto to the proper Department and enquired for information relating to the Cobalt District and was handed the regulations marked Exhibit 1 to his evidence taken *de bene esse*, put in and marked as Exhibit 16 at the trial.

The extracts from these regulations which either side considered material to this appeal are printed. Appended to the regulations as handed Mr. Green was a copy of the Order-in-Council of 30th October, 1905.

26. This Order-in-Council separated the Township of Coleman from 30 the Temiskaming Mining Division which had been set aside by Order-in-Council of the 5th of April, 1905, and constituted the said Township of Coleman a separate Mining Division under the name and title of the Coleman Mining Division and subject to the amended regulations for mining division save as provided in the previous part of this Order-in-Council.

27. Cobalt Lake was shown to be in the Township of Coleman. This was expressly found by the learned Trial Judge.

28. Mr. Green was further informed that if he went to Haileybury he could secure a map showing what was open for location, and accordingly he went to Haileybury and at the office of the official in charge of the Coleman Mining Division procured a map of the Township of Coleman which was marked Exhibit 2 on his examination. He was informed by the Officer in charge as to the meaning of the letters on the map, that "A" meant claims applied for "l" leased and "p" patent. Having received this Mr.

P. 19, l. 25.

P. 49, l. 15.

P. 49, l. 23.

P. 72 *et seq.*

P. 79, l. 35.

P. 72 *et seq.*

P. 72, l. 2.

Pp. 79 and 80.

P. 80, l. 33 *et seq.*

P. 19, l. 40.

P. 22, l. 36.

P. 100, l. 7.

P. 49, l. 33.

P. 50, l. 8.

P. 66, l. 5.

Green came to the conclusion which the appellants contend was the legal effect of the Order-in-Council that Cobalt Lake was open for exploration.

29. It is now said that if Mr. Green had made further search he would have learned that there were prior applications on the files of the Crown Lands Department. The appellants submit that he was justified in relying on the information given him showing that Cobalt Lake was open for exploration. These alleged applications are, however, shown to have been entirely without basis. The first of these is the alleged application of William Clark Chambers. This is stated by Mr. Gibson the first 10 witness for the respondents, to be based on no discovery. The essential part of Mr. Chambers' affidavit is, referring to certain out-cropping some distance from the property in question, "I verily believe that it will eventually be traced across the road allowance and into Long Lake" as Cobalt Lake was then called. This was clearly no allegation of a valid discovery.

30. As to the alleged Bessey or Bessey and Dreany application there was the report of Mr. Corkill on August 17th, 1905, eleven days before the Order-in-Council of 28th August, 1905. The report of Mr. Corkill showed that the alleged discoveries were first situate on the road allowance which, of course, could not constitute a valid claim and secondly, an allegation of wash 20 ore which was not ore "in place" as was required by 61 Victoria, Chapter 11, Section 3. There was a third application for the road allowance which as being immaterial was not printed as the road allowance had to be dealt with under Statute, 4 Edward VII., Chapter 22, Section 20. Had Mr. Green, therefore, instead of relying on the representations made to him by the officials of the Department showing Cobalt Lake as open for exploration, searched for himself he would have arrived at the same conclusion that there was no pending application, the matter having been concluded by Mr. Corkill's report on the 17th of August, 1905. This is indicated by the map handed Mr. Green at Haileybury. If the application had been 30 considered as pending the letter "a" would have appeared on Cobalt Lake as it does on some other under-water areas, application for which appears to have been pending. As the letter did not appear on this map the proper conclusion was that there was no pending application for the lands in question. As to the subsequent report of Messrs. Mickle and Robinson made on the 25th August, 1906, it is sufficient to point out that this was long after the right of the appellants had become vested, and that it was possible by making a valid discovery to secure the property in question. 40 is clearly shown by the instructions sent pursuant to the special ruling of the Minister on the 13th of July, 1905. This shows that all that was necessary to secure the territory in question was to make what the Minister describes as an actual discovery of valuable mineral in place.

31. The Honourable the Chief Justice of the Court of Appeal for Ontario says "There was nothing misleading in the information he did obtain." If it was intended that Cobalt Lake should not be open, then it is submitted that the information was misleading and the evidence shows

RECORD.

P. 67.

P. 11, ls. 15 and

16.

P. 67, l. 28.

P. 68, l. 24.

P. 71.

P. 50, l. 39.

P. 89.

P. 70, l. 21.

P. 122, l. 30.

RECORD.

P. 72, l. 4.

P. 80, l. 33.

P. 51, l. 8.

that it did mislead. The pamphlet handed Mr. Green contained the Order-in-Council of 30th October, 1905, which constituted the Township of Coleman a separate mining division. The map of Coleman Township (Exhibit 2) showed what parts thereof were patented, leased or applied for. It showed that the part of Cobalt Lake now in question was not at that time patented, leased or applied for and there was nothing to indicate it was withdrawn. These were the only exceptions indicated and it was distinctly represented to Mr. Green that the map would show what was open for location. The pamphlet and map, therefore, amounted to a distinct and unequivocal representation that the part of Cobalt Lake on 10 which exploration work was undertaken, was open for exploration. "The Mines Act, 1906," shows the view of the Legislature to have been that after the Order-in-Council of 20th October, 1905, the Gillies Limit alone was subject to the Order-in-Council of 14th August, 1905. The Crown Lands Department which had prepared the pamphlet handed out, clearly believed and alleged that Cobalt Lake was open then for prospecting and that Cobalt Lake and Kerr Lake being in the Township of Coleman were taken out of the operation of the Order-in-Council of 14th August, 1905, by the subsequent Order-in-Council of 30th October, 1905. Otherwise all 20 reference to the Order-in-Council of 14th August, 1905, would not have been omitted from the pamphlet which contained the Order-in-Council of 30th October, 1905, constituting the Township of Coleman a separate Mining and in another part of pamphlet it was expressly stated that a Miner's License shall authorize the licensee to "explore any portion of the Mining Division named in his License." The only exceptions pointed out to Mr. Green were of lands patented, leased or applied for, exceptions which did not extend to Cobalt Lake or at all events to any part of that now in question.

P. 73, l. 7.

P. 51, l. 2.

P. 122, l. 34.

P. 44, l. 10.

P. 53, l. 32.

P. 53, l. 46.

P. 49, l. 28.

P. 58, l. 25.

P. 51, l. 10.

30 32. But the learned Chief Justice says—"A plain direct question either at the Bureau of Mines or Haileybury would have undoubtedly elicited the information that Cobalt Lake was not open for prospecting." This, of course, is pure surmise and it is submitted the proper inference is the contrary. It was shewn in evidence that in March, 1906, a very careful search was made at Haileybury for any Order-in-Council authorizing the Mining Recorder to refuse to record claims on Cobalt Lake. No trace of such Order-in-Council or of the Order-in-Council of 14th August, 1905, could then be found at the Government office at Haileybury.

40 Although it was represented that the information handed Mr. Green would be complete when he obtained the map which would, was stated, show what was open for location and although he was told that the map handed him was up to date, it was not until after his discovery and the attempt to record his claim that the slightest hint reached him of the Order-in-Council of 14th August, 1905, or that it was claimed Cobalt Lake was not open for prospecting.

33. That there was no valid or known reason for not dealing with Cobalt Lake according to law and granting parts of it as mining claims to discovereis is shown by the notice sent on the instructions of the Minister to the Mining Recorder on 13th July, 1905, "that he may accept and record claims on the bed of Cobalt Lake."

RECORD.

P. 70, l. 21.

34. It was stated by a member of the Government that the Order-in-Council of 14th August, 1905, withdrawing Cobalt Lake was posted up in the Recorder's Office at the time of Mr. Green's discovery. The Mining Recorder in his evidence states that until a week before the trial he was under the impression that this was the fact but he admitted that the Order-in-Council was not at that time posted up. There was, therefore, not the slightest reason for Mr. Green suspecting that the information given him indicating Cobalt Lake open for prospecting was incorrect.

P. 44, l. 13.

P. 44, ls. 30-32.

P. 41, l. 8.

10 10 was under the impression that this was the fact but he admitted that the Order-in-Council was not at that time posted up. There was, therefore, not the slightest reason for Mr. Green suspecting that the information given him indicating Cobalt Lake open for prospecting was incorrect.

35. The proper conclusion from the evidence is that if special enquiry had been made about Cobalt Lake the reply would probably have been that it was open for prospecting. This was the information given on 13th July, 1905. The ground of that information was obviously that Cobalt Lake being part of the Temiskaming Mining Division set aside by Order-in-Council, 5th April, 1905, was thereby opened for prospecting. If a 20 20 mise is to be made, the presumption surely is that a consistent answer would have been given as to effect of the Order-in-Council of 30th October, 1905, and if so the answer would have been that after 30th October, 1905, Cobalt Lake was open for exploration and that the Recorder should, to use the words of the Minister, "accept and record claims on the bed of Cobalt Lake."

P. 70.

P. 72, l. 6.

P. 70, l. 22.

36. The conclusion which the learned Trial Judge found was formed by Mr. Green was, therefore, perfectly justifiable. It would have been manifestly imprudent for Mr. Green to have made minute special enquiries in regard to Cobalt Lake and run the risk of disclosing to perhaps not 30 30 over scrupulous rivals the place of his intended operations, until the preparations for complying with the regulations as to discovery were complete. It is to be observed that any person had the right to be present in the offices where information was obtained and to hear Mr. Green's inquiries and the answers thereto. The Department having represented that all the information in regard to the Cobalt District had been given to Mr. Green there was, it is submitted, no duty to make further enquiry.

37. Mr. Green having thus satisfied himself that Cobalt Lake was open for exploration proceeded to explore. A diamond drill was purchased together with a gasoline engine to run it and the other necessary 40 40 equipment. A house was erected on the ice on Cobalt Lake. The machinery was started under the direction of an Engineer and after working there some weeks a discovery was made on the 7th of March, 1906. No objection was made to this work which was openly done.

P. 50, l. 24.

P. 51, l. 15.

P. 51, l. 30.

38. After the said preparations were made and the diamond drill placed on the ice any one at or near Cobalt, including the Government

P. 51, l. 15.

RECORD.

P. 51, l. 30.

P. 51, l. 18.

P. 119, l. 31.

P. 64, l. 14.

P. 29, l. 24 *et seq.*

P. 64, l. 27.

P. 72, l. 11.

P. 64, l. 8.

P. 64, l. 27.

P. 29, l. 43.

P. 37, l. 10.

P. 81, l. 14.

officials, could have seen the work of exploration in progress and if Cobalt Lake had been considered at that time (February and March, 1906) withdrawn, it is certain that objection would have been made, but it is shown that no objection was made though the fact of said exploration work on Cobalt Lake must have been generally known for several weeks before said discovery.

39. In the judgment of the Honourable the Chief Justice of Ontario, he says:—"It is plain that the explorations leading to the alleged discovery were all made before Mr. Green or any one assisting him in the work had procured a Miners' License." This is not only not supported by the evidence but the contrary was distinctly and conclusively proved.

Col. J. R. Gordon after referring to Mr. Green's going to Haileybury, where it is shown he obtained his license, says:—"He came back and we went drilling in Mr. Green's presence and eventually the drill got choked up, blocked and we pulled the drill rod out and found the core, and found a core which contained cobalt and silver."

40. Mr. Green having been asked had they stopped drilling at that time, referring to the time of his return with his license says:—"No, they were still working. I can't say as to when I was away, but they were drilling when I got back and the mineral was brought up while I was 20 there."

41. As to the exploration before a license was obtained this was clearly authorized by the Statute. The words of the Statute which were quoted in the said pamphlet were "Any person may explore," etc. There were exceptions which are shown not to be applicable to the present case. By no twisting can the plain words "any person" be construed to mean "any licensee."

42. The Honourable the Chief Justice of Ontario further says:—"And it was not until they believed themselves to be on the eve of a discovery of valuable mineral that the withdrawal of a core from the diamond drill was suspended until a Miner's License was hurriedly obtained." To say that there was any hurry in obtaining the license is not justified by the evidence. There is no foundation on the evidence, or in fact for the statement that the withdrawal of a core was suspended. On the contrary it was shown that there was drilling in the presence of the licensee after he had obtained his license, and it was only because the drill got choked, blocked, that the drill rod was pulled out at the time. It was attempted to be argued that the discovery of calcite was a valuable mineral, but it was expressly shown that in the calcite found before the discovery on the 7th March no silver was present, so that it is on the evidence clearly established that there was exploration by drilling after Mr. Green obtained his Miners' License, and that as the result of such exploration the discovery, under which the appellants' claim, was made.

43. At the time of the making of the discovery Mr. Green was the

holder of a Miners' License. This discovery is found by the Trial Judge in the words "pierced a valuable silver vein," who also states the evidence of Colonel Gordon, the Engineer, is to be given full credence throughout. Mr. Green thereupon under the express provisions of the Statute by virtue of the said discovery acquired a right to mark and stake out a mining claim and the right to work the same, and to transfer his interest therein to another licensee. Immediately after the discovery the mining claim was surveyed in accordance with the law and the regulations and included the part of Cobalt Lake, designated as J.S. 71 10 and containing Nineteen and three-quarter acres, as shewn in Exhibit 22.

44. The Order-in-Council of 30th October, 1905, contains the words "Provided that in the case of lots or parcels of broken outline or of irregular shape or size the claim may be of irregular shape and of greater or less area than twenty acres but not to exceed thirty acres." The claim was then staked out in accordance with the Act and regulations, the discovery post being placed Two hundred and fifty-three feet southwest of number one post, number one post and number four post being placed at the points where the concession line intersected the shore line and numbers Two and Three where the boundary line between J.S. 51 and J.S. 71 20 (the latter being the land in question) intersected the shore line.

45. After the claim had been surveyed and staked out as aforesaid and on the following morning the 8th of March, 1906, a notice of the claim was duly tendered to the Mining Recorder, who then stated that he had instructions not to record claims on the bed of Cobalt Lake. On behalf of the discoverer, the Government fees were paid to the Department and received but subsequently tendered back. Evidence was then tendered the Crown Lands Department of Mr. Green's discovery, but by letter reply was given, saying, "as the Department is not prepared to consider Mr. Green's application there would appear to be nothing to gain 30 by examining the evidence as to Mr. Green's discovery." The evidence was again tendered but was again refused, the letter of the Department returning it, being dated 22nd March, 1906.

46. The refusal to record the appellants' claim was based solely on the ground that it was contended that Cobalt Lake was not open for exploration.

Under section 160 of "The Mines Act, 1906," (6 Edward VII., Cap. 11), the time for performance of the working conditions was not to commence until the claim was recorded. The license year (from 7th March, 1906), during which under the previous legislation (61 Victoria, Chapter 40 11, Section 8, as amended by 62 Victoria, Chapter 10, Section 13), the first year's work was required to be done, had not expired when the patent to the respondents was issued on the 15th of January, 1907. The said legislation was repealed by "The Mines Act, 1906," (6 Edward VII., Cap. 11), on the 14th of May, 1906. In any event performance of the working conditions was prevented by the Government. The respondents

RECORD.

P. 51, l. 24.

P. 99, l. 28.

P. 99, l. 31.

P. 22, l. 38.

Index No. 28.

P. 80, l. 30.

P. 59, l. 36.

P. 52, l. 13.

P. 31, l. 30.

P. 82.

P. 83, l. 26.

P. 84.

P. 66, l. 17.

P. 41, l. 45.

P. 81, l. 14.

P. 47, l. 9.

P. 98, l. 20.

P. 63, l. 13.

RECORD.

are estopped and it is not open to them to object that the working conditions were not performed.

P. 54, l. 19.
r. 54, l. 21.

47. Mr. Green then pressed for an investigation of the matter and for an opportunity of proving the facts upon which his claim was based, but no opportunity of proving the facts could be obtained.

48. The Legislature subsequently passed "The Mines Act, 1906," (6 Edward VII., Cap. 11), section 100 of which, dealt specially with the Gillies Bros. Timber Limit described in the Order-in-Council of the 14th August, 1905. This Act came into force on the 14th of May, 1906, subsequent to the right of the appellants and is consistent with Cobalt Lake being open for exploration as the appellants contend it was.

49. Another Act was hurriedly passed at the same Session, 6 Edward VII., Chapter 12, which received its three readings in one day. It is not pretended that any notice of the passing of this Act was given to Mr. Green or to the appellants and for the reasons which will hereinafter be set forth it is contended that the said Act does not affect the appellants' rights.

P. 55, l. 25.
P. 44, l. 33.
P. 41, l. 4.

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Recd 53
Green W.*

50. Mr. Green shows that the Government heard the statement of the Mining Recorder without giving him (Green) an opportunity of knowing what the Mining Recorder said. It was, however, shown by Mr. Cochrane that the Prime Minister had stated in the House that at the time of Mr. Green's discovery the Order-in-Council of 14th August was posted up in Mr. Smith's office. The Recorder, Mr. Smith, was called as a witness and stated that the Order-in-Council was not posted up at the time of Mr. Green's application. He stated that until about a week before the trial he had been positive that it had been reposted on his entrance to his new office in November, 1905, but that he was msitaken in this.

51. As the Prime Minister would not be presumed to have invented the statement made to the House, the fair inference from the evidence, it is submitted, is that the Mining Recorder gave him the false information he in turn gave to the Legislature no doubt mistakenly believing it to be true.

P. 91.
P. 54, l. 19.
P. 50, l. 24.

52. It was clearly on this basis that the Order-in-Council of 22nd November, 1906 (Exhibit 7), was passed. There was no authority whatever to pass such an Order-in-Council as against Mr. Green's application. The Act, 6 Edward VII., Chapter 12, referred to discoveries before the 14th of August, 1905, and in addition from the above it follows that the said Order-in-Council was passed by mistake, improvidently and in error and while the Government were acting on the mistaken information given by the Recorder that the said Order-in-Council of 14th August, 1905, was posted up in his office at the date of Mr. Green's discovery. The importance of this is seen from the circumstance that one of the facts which Mr. Green offered to prove and which he did subsequently prove at the trial, was that he had honestly concluded on the information supplied him by the Government officials that Cobalt Lake was open for

exploration. The Government acted on the basis of the Order-in-Council having been posted up and on this basis refused to consider the evidence in support of Mr. Green's claim.

53. It is submitted that the Act, 6 Edward VII., Chapter 12, relied on by the appellants is not applicable. The principles upon which such a retroactive Statute should be construed in favor of preserving the vested rights of the appellants, are so well settled and recognized as not to require re-iteration. In dealing with this Act (6 Edward VII., Cap. 12), it is to be borne in mind that the Order-in-Council of 14th of August, 10 1905, was passed wholly without legislative authority and was not until months afterwards (4th November, 1905) published in the Gazette. The said Act does not in any way directly or indirectly interfere with the operation of the subsequent Orders-in-Council of the 28th of August, 1905, and 30th October, 1905, the latter of which threw Cobalt Lake open for exploration. The words declaring the said Order-in-Council "to have been and now to be binding and effectual for the purposes therein mentioned" refer to the purpose recited in the said Order-in-Council of the 14th of August, 1905, namely, the desirability of exercising careful judgment in arriving at a conclusion and the words of the Act are apt to do 20 away with any possible legal effects of the irregularity and want of authority of the Order-in-Council of the 14th of August, 1905, and so far as Cobalt Lake is concerned full effect is given to every word of the said Statute by declaring that the Order-in-Council of 14th August withdrew Cobalt Lake from the 14th of August, 1905, until the 28th of August, 1905, and that no one can now question the binding operation of the said Order-in-Council during said two weeks which include the date of Mr. Corkill's report.

54. That this is the legal construction is indicated by section 100 of 30 "The Mines Act 1906" assented to on the same day, 14th May, 1906, which deals in detail with the Gillies Timber Limit but does not refer to Cobalt Lake which had been thrown open for exploration on the 30th day of October, 1905. This is strengthened by the reference in the Act to discovery or discoveries at or before the time of the passing of such Order-in-Council.

55. Owing to the discovery by Mr. Green of a valuable silver vein under Cobalt Lake the property (which is in the vicinity of other properties which development has proved to be valuable) increased amazingly in value, so that the Government was able to obtain for it and the 40 balance of the bed of Cobalt Lake (in which no valuable ore had been discovered outside of the mining claim of the appellants) the immense sum of \$1,085,000, many thousand times more than the sum for which the Government was bound to convey the property under "The Mines Act" to the appellants. Were we not dealing with the Crown the inference would be irresistible that there was a scheme to defraud the appellants out of their

RECORD.

P. 79, 1. 7.

RECORD.
P. 100, l. 31.

just rights. Surely the honor and dignity of the Crown should not be sullied by what would not be tolerated on the part of a subject.

P. 94, l. 13.

56. It is submitted that the alleged patent to the respondents was at the time it was issued and as against the appellants, still is null and void. The learned Trial Judge held that it was issued without any discovery by or for them (the respondents) and that they took with full notice and knowledge of the appellants rights. In fact the letter enclosing the bulk of the purchase price on behalf of the respondents refers to appellants as "claiming to be entitled to said property." The land in question being by virtue of the Order-in-Council of 30th October, 1905, in a mining division could only be granted on discovery. It is submitted on the authority of *Reynolds v. Attorney General* (1896) Appeal Cases 240, that the Crown Lands Department and the Government were bound by the Statutes in force and could not exceed their statutory authority. 10

P. 98, l. 15.

57. The learned Chief Justice of Ontario states that "under section 33 of 'The Mines Act' (R.S.O. 1897, Cap. 36), a sale was made to the defendants." There is nothing to indicate that either the sale or the patent to the defendants was made under the said section, which in fact did not authorize any such sale. It provided that the Lieutenant-Governor may "fix the price per acre at any greater sum than is hereinbefore provided or may offer the same at public auction on such terms and conditions as may be fixed by Order-in-Council." If a greater price per acre were fixed, "The Mines Act" in other respects would have to be complied with. A greater price per acre was not so fixed, nor was "The Mines Act" otherwise complied with by the respondents and there is no pretence that there was any offer by public auction. The patent to the Respondents does not purport to be issued pursuant to "The Mines Act." It was made subject to sections 188 to 221 of "The Mines Act 1906" (6 Edward VII., Cap. 11), showing the clear intention to exclude the balance of "The Mines Act" (R.S.O. 1897, Cap. 36), under which the patent would have been clearly void. 20 30

P. 98, l. 20.
P. 7, l. 21 *et seq.*

58. Moreover before the alleged sale to the respondents or any dealings with them the said section 33 (R.S.O. 1897, Cap. 36), was repealed by section 222 of "The Mines Act 1906" (6 Edward VII., Cap. 11), which came into force on the 14th of May, 1906. The alleged patent to the respondents was dated the 15th January, 1907, and the sale to the respondents is alleged in the Statement of Defence to be made pursuant to advertisement and a tender in November and December, 1906. Section 98 of "The Mines Act 1906" (6 Edward VII., Cap. 11), which was based on the previous section 33 of "The Mines Act" (R.S.O. 1897, Cap. 36), clearly does not authorize such a sale as that made to the respondents. Section 100 is confined to the Gillies Limit. Section 99 provides that "the Lieutenant-Governor may re-open for exploration, location or sale as mining lands any Crown Lands which may have at any time been withdrawn from exploration or sale either upon the terms and conditions contained in this Act or upon such other terms and conditions as 40

may be provided or authorized in that behalf by the Legislature." It is clear that the sale to the respondents was not upon the terms and conditions contained in "The Mines Act 1906" (6 Edward VII., Cap. 11), nor were any other terms or conditions provided or authorized in that behalf by the Legislature. It is submitted that the said sale and patent were wholly unauthorized and illegal and that the patent to the respondents was wholly void.

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59. In any event it is submitted that the patent to the respondents did not convey the precious metals. By the Statute passed by the first Parliament of Upper Canada, 32 George III., Chapter 1, it is provided that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on the 15th day of October, 1792. Part of the law so introduced was that laid down in the Mines Case reported in Plowden. Pp. 97-98.

The principle of the decision in Woolley vs. The Attorney-General of Victoria (1877), 2 Appeal Cases 163, is applicable to Ontario. This was so held by the Chancellor Sir John A. Boyd in The Ontario Mining Company v. Seybold, 31 Ontario Reports 386 at page 399, line 7, which decision was confirmed by the Divisional Court, 32 Ontario Reports 301, 20 by the Supreme Court of Canada, 32 Supreme Court Reports p. 1, and by this Board (1903) Appeal Cases p. 73.

60. The rule was held by the Judicial Committee of the Privy Council applicable to British Columbia in Esquimalt & Nanaimo Railway Company vs. Bainbridge (1896) Appeal Cases 561, following The Attorney-General of British Columbia vs. The Attorney-General of Canada, 14 Appeal Cases, p. 295, which in turn followed The Attorney-General of Ontario vs. Mercer, 8 Appeal Cases 767. The words relied on in that case were, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder," 30 and were considerably wider than in the present.

61. It is to be observed that there was a Statute in that case also and it was contended (as is herein argued by the respondents) that it would be presumed on account of the large price paid that the precious metals should be held to pass and be included in the grant, the land being good for nothing except for the gold. This argument was in that case unavailing and is entitled to no greater consideration here.

62. The receipt by the Government of \$1,085,000 out of \$3,635,000 P. 7, l. 43. alleged to have been paid by the respondents would, it is submitted, be no P. 8, l. 1. ground for altering the construction and legal effect of said patent. The 40 Government and Legislature have legal authority to raise revenue in a legitimate way but it was not contemplated that Provincial revenue should be raised by plundering private persons of the results of their enterprise and expenditure and this plain attempt to do so should not be allowed to succeed.

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P. 29, 1. 47.
P. 59, 1. 26.
P. 83, 1. 5.

P. 125, 1. 4.

63. There is the further consideration, namely, that the discovery under which the appellants claim being of silver and the right of the appellants having been vested, the patent to the respondents it is submitted should be construed strictly and as intended not to deprive the appellants of their vested right to the silver in the lands in question.

64. The Honourable Chief Justice of Ontario refers to the Interpretation clauses of "The Mines Act" (R.S.O. 1897, Chapter 26) and of "The Mines Act 1906" (6 Edward VII., Cap. 11), but these clauses in each case only define the meaning of words which "occur in this Act and in the Orders-in-Council or regulations under it." Such interpretation clauses 10 cannot be applied to the patent to the respondents which was not issued under this Act and its operation cannot, it is submitted, be extended by anything in this Act.

65. The appellants are not in the same position. Their mining claim under "The Mines Act" (R.S.O. 1897, Cap. 36) and amendments, clearly carried the silver and other precious metals. The discovery under which the appellants claim was of silver as well as cobalt—"pierced a valuable silver vein" are the words of the Trial Judge.

As to the remark of the Honourable the Chief Justice of Ontario that this point is not properly open to the plaintiffs on this appeal, the appellants would point out that they are claiming all the minerals including the precious metals and are relying upon the discovery of silver and under that claim it is quite open. In other words the appellants were claiming both the precious and base minerals and even if by force of the ex post facto legislation, the appellants were unjustly deprived of the base minerals it is submitted that on the record they are still entitled to claim the precious metals or at all events the silver.

66. The Act respecting Cobalt Lake and Kerr Lake, 7 Edward VII., Chapter 15, passed 20th April, 1907, is it is submitted in the nature of a private Act within the meaning of the Interpretation Act. The combined areas of Cobalt Lake and Kerr Lake referred to in the Statute amount to less than One hundred acres in all and the Act has all the other indicia of a private Act. It is submitted that it would be none the less a private Act even if it contained a clause declaring it to be a public Act. Sub-section 58 of section 8 of "The Interpretation Act" (R.S.O. 1897, Chapter 1, now 7 Edward VII., Cap. 2, s. 7, ss. 53), enacted "Nor if the Act be in the nature of a private Act shall it affect the rights of any person or body politic, corporate or collegiate, such only excepted as are therein mentioned or referred to." The appellants are not mentioned or referred to in 7 Edward VII., Chapter 15, and the consequence is that the statute must be construed 40 as not affecting the appellants' rights."

One of the objects of the section above cited of the Interpretation Act is to provide that notice may be given to any one whose rights it is intended to affect by proposed legislation.

It was said in *Hessee v. Stephenson*, 3 B. & P. 565, at page 578, "But though the Act be public it is of a private nature. The only object of the proviso making it a public Act is that it may be judicially taken notice of without being specially pleaded." "It is not possible to consider this Act as giving any title to K (the patentee) which he had not at the time it was passed. Such has been the construction which has always been put upon Acts of Parliament of this nature." See also, *Maxwell on Statutes* 4th Ed., page 327 and 328, and *River Weir Commons v. Thompson*, 2 App. Case 743 at 766.

10 67. No notice of the legislation in question was given to the appellants nor any opportunity of submitting to the Legislature or the Government evidence of the facts.

68. The proper construction to be put upon the said Act, 7 Edward VII., Cap. 15, is that the Act was dealing with such part of Kerr Lake and Cobalt Lake as was then vested in the Crown and as to which no claim had yet been raised but to which claims might be subsequently raised. The language of the Statute is "It is desirable that no question should be raised." This is apt language when speaking of claims that may arise in the future. It can have no application to the questions in this action which 20 had been raised long before this Act was passed, the present action having been before that at issue and set down for trial. This view is confirmed by the last clause of the Statute which provides that notwithstanding anything contained in the Statute, claims made or arising prior to the sales should not be affected by it. It follows, therefore, that the appellants' claim in this action is untouched by the Statute. This is in accordance with natural justice and equity and merely means that the purchasers took their title subject to any prior claims which had been made before the Statute was passed, but free from those which might arise subsequent to the sales, based on the ground that the Executive had exceeded its powers in 30 attempting to sell and convey the lands without any legislative sanction or on other grounds. All this means is that the purchasers took their rights subject to claims of which they had notice, as it is expressly found they had, of the appellants' claim but free from claims of which they had no notice.

RECORD.

P. 100, l. 34.
P. 94.

69. The said Acts profess only to confirm the rights given by the said patent but as the patent could give only any rights the Crown had when it was issued, neither it nor the legislation could affect rights which were vested in the appellants before the said patent was issued.

70. The legislation in question does not necessarily apply to the appellants. The appellants claim to be entitled to only part of the property 40 under Cobalt Lake and even if the legislation in question is held to be constitutional it can be given due effect by limiting its operation to that part of the Lake which was then vested in the Crown free from any claim.

71. Unless they must do so by clear and compelling language used, the Courts will not hold that private property is intended to be confiscated by an enactment, unless adequate compensation is expressly given for the

rights which are taken away. The language here is not sufficient and no compensation is provided. See, *Metropolitan Asylum District v. Hill* (1880) 5 Appeal Cases 582. The provision for an appeal to the bounty of an Executive that would rush the Statute, (6 Edward VII., Cap. 12), through its three readings in one day by its chance majority, is no real provision for compensation but is wholly illusory.

72. The appellants submit that the said legislation of 1906 and 1907 is ultra vires of the Ontario Legislature and void. When the Imperial Parliament assigned to the Dominion and the Provinces their respective powers and functions the power of appointing the Superior Court Judges 10 and therewith the consequent control and authority over litigation during its progress in the Courts was assigned to the Dominion.

73. The action of the appellants was brought before the said Act last mentioned was passed and was actually set down for trial. The appellants were entitled to a trial thereof by a Judge appointed by the Governor-General in Council under the provisions of the British North America Act in that behalf and it was not competent for the Legislature to usurp the functions of the Courts by enacting the legislation in question. If it could be validly done in this case every dispute respecting property and civil rights might be so judged, not by a Judge constitutionally appointed by the 20 Dominion but by the majority of the Provincial Legislature.

74. The appellants submit that the British North America Act having recited that the Dominion of Canada should be federally united with a constitution similar in principle to that of the United Kingdom, embodied as part of the Canadian constitution the fundamental principles of British jurisprudence and particularly the provisions of Magna Charta and that the Ontario Legislature is bound thereby, at least so long as that venerable bulwark of our rights and liberties is unrepealed.

75. The appellants submit that the said legislation of the Ontario Legislature in question having been passed in violation of the constitutional 30 safe-guards which prevent private property from being taken without due process of law and declare that justice should not be sold, denied or delayed and the other fundamental principles of the British constitution was not authorized by the British North America Act and is ultra vires and wholly void.

76. The due process of law to the protection of which it is submitted, British subjects in Ontario are entitled (to adapt language which has become classical) implies a tribunal which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.

77. The said Statutes are not Legislative Acts within the authority 40 granted to the Provincial Legislatures but being attempts at arbitrary decrees contrary to the law of God and to the provisions of the Great Charter hereinbefore referred to and to the other safe guards of private rights, are unwarranted and ultra vires of the Provincial Legislature.

78. Otherwise there is no general permanent law for Courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. The Judges to be appointed by the Federal authorities were it is submitted not intended to sit to execute such arbitrary judgments of the Legislature but to administer justice according to law. The authority given to the Legislature is a power to make laws. The very nature of this power implies the element of generality.

79. "The British North America Act" gives the Provincial Legislatures powers to make laws respecting property and civil rights. They did not give them the right to confiscate property and civil rights. Confiscation is not legislation. "Is it conceivable that a Provincial Executive has power to confiscate all the private property in a province and sell it or otherwise deal with it as it might choose if a subservient majority in the Legislature condones it."

80. Many cases have been argued before this Board as to the taxing powers of the Canadian Provinces. If it be that all private property in each Province is liable to confiscation by the Provinces without compensation and therefore is practically held on sufferance of the various 20 Provincial Executives so long as they control chance majorities in the local Legislatures, then surely no question could properly arise as to the taxing powers of the Provinces. If the local legislatures cannot merely make laws as to property and civil rights but can also confiscate property and civil rights without compensation and in doing so were intended to be restrained by "no rule human or divine" then surely it was idle for the Constitution to bestow powers of taxation on the Provinces or the Courts to inquire into and decide the limitations thereof.

81. If the present legislation which was described by the Minister of Justice as "confiscation of property and an abuse of legislative power" 30 is sustained, it is obvious that all rights of private property will be completely subverted in all the Canadian Provinces. As our whole civilization is based upon the right of property, it is submitted that the intention to vest in the local legislatures such a power of confiscation, destructive of the very foundation of British Institutions, will not without stronger words than appear in "The British North America Act" be imputed to the Imperial Parliament. On the contrary it is submitted such an interpretation should be given as will preserve the right of property which as Prof. Holland has aptly said is consecrated by the command "Thou Shalt Not Steal." This prohibition, it is submitted, is binding on the Province.

82. If there is not power to confiscate all, there cannot be power to confiscate any. Confiscation is, it is submitted, beyond the power of Provincial Legislature. Lord Watson in *Dobie v. The Temporalities Board* (1881-2) 7 Appeal Cases 136, at page 151, says, "that the Quebec Legislature shall have power also to confiscate these funds or any part of them,

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P. 111, l. 42.

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for provincial purposes," "is a proposition for which no warrant is to be found in the Act of 1867." This contention is supported by "The Fisheries Case," (1898), Appeal Cases 700 at 713, in which Lord Herschel says "If the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by section 91." It is submitted that the same canon of construction applies to section 92. It is submitted that it is not the function or within the power of a local legislature to pass a Statute for the purpose of confiscating property without compensation. Such a Statute is not an exercise of the power of making 10 laws.

In re Hamilton & North West Railway Company, (1876), 39 U.C. Q.B. 93, Chief Justice Harrison says at p. 111, "The functions proper of a legislative body are, to make laws for the government of the people," and at page 112 says "In the reading of 'The British North America Act' one cannot fail to observe the distribution of powers into three great divisions of executive, legislative and judicial."

83. There is no pretence that any consideration of public policy required the retention in the Crown of the bed of Cobalt Lake, for the case of respondents is that the Crown has alienated all interest therein. The Minister himself on the 13th July, 1905, in accordance with the declared policy of the Province in favor of exploration and discovery directs the Recorder that he may "record claims on the bed of Cobalt Lake," and warns him to satisfy himself that "an actual discovery of valuable mineral in place has been made on the land applied for." Mr. Green, having complied with this condition and the regulations, became entitled to a mining claim of 20 acres. It is submitted that the British North America Act was not intended to authorize the Provincial Government and Legislature to confiscate the fruits of Mr. Green's enterprise, expenditure, exploration and discovery and transfer them to others, even if a 30 considerable share of the plunder did go into the Provincial Treasury.

84. The appellants' claim having been in suit and the action set down for trial before the legislation in question was passed, their right to have it decided by the Courts is not taken away. Reference is made to In re Will of Wi Matua (1908), Appeal Cases 448.

85. Even if it is held that the Provincial Legislature had judicial as well as legislative power then on the principle of Chang Hon Kin v. Pigget (1909), A.C. 312, following in re Pollard (1868), 5 Moo. P.C. (N.S.), p. 11, the said Statute is void on the ground that no notice was given the appellants and no opportunity was afforded of the appellants being heard. It has long been considered a fundamental principle of British Institutions that a man's cause cannot be tried in his absence, but if this legislation is upheld by this Board, the Canadian Provinces will be declared to have been living in a fool's paradise.

86. Lord Camden's view, which is entitled to the greatest consideration, was expressed by him as follows: "The sovereign authority, the om-

P. 70, 1. 22.
P. 70, 1. 25.

nipotence of the Legislature, is a favorite doctrine, but there are some things you cannot do. You cannot enact anything against the Divine law. You cannot take away any man's private property without making him a compensation. You have no right to condemn any man by bill of attainder without hearing him."

These words, addressed to the House of Lords as part of the Imperial Parliament, are a *fortiori* applicable to a Provincial Legislature.

THE APPELLANTS HUMBLY SUBMIT that the appeal should be allowed and judgment directed to be entered for the appellants as **10** claimed, for the reasons appearing in their case and in the Record and for the following among other

REASONS.

1. The findings of fact in favor of the appellants by the Trial Judge who heard the evidence should not be interfered with.
2. Under the said findings of fact the appellants are entitled to the relief claimed.
3. The Order-in-Council of 30th October, 1905, set apart the Township of Coleman as a separate Mining Division.
4. The said Order-in-Council after publication in the Ontario Gazette **20** on the 4th of November, 1905, had the force of law.
5. Cobalt Lake being part of the Township of Coleman was open for exploration at the time of the discovery under which the appellants claim, 7th March, 1906.
6. No exception of Cobalt Lake appears in the said Order-in-Council of 30th October, 1905, nor was there any subsequent Orders-in-Council which interfered with the legal effect of the said Order-in-Council of 30th October, 1905.
7. By virtue of the said discovery the assignor of the appellants acquired a statutory right to the mining claim in question with the right to **30** assign same.
8. Upon the assignment of said mining claim to the appellants they became and are entitled thereto.
9. The finding of the Trial Judge is correct—that all legitimate means were used by the appellants to assert their said rights.
10. The patent granting the lands in question to the respondents was unauthorized and void.
11. Section 33 of "The Mines Act," R.S.O. 1897, Chapter 36, upon which the respondents patent dated 15th January, 1907, is supported by the Court of Appeal was repealed on the 14th of May, 1906, by "The Mines **40** Act, 1906," before any dealings with the respondents.

12. The lands covered by the said patent having been included by the Order-in-Council of 30th October, 1905, in the Coleman Mining Division could only be dealt with by the Government as a mining claim and granted on discovery.

13. The said patent was issued improvidently and in error.

14. In any event the patent to the respondents did not carry the precious metals, the right to which is vested in the appellants.

15. The appellants, before the said patent to the respondents, had become entitled to the precious metals in and under said mining claim, as well as to the base metals and even if the subsequent patent and the ex post facto legislation upon which the respondents rely are valid they do not upon their true legal construction operate to divest the appellants of their right to the precious metals. 10

16. The Act of 1906 will, on the well established rules of construction, not be construed as retrospectively interfering with the rights of the appellants which before the passing of the said Act had become vested.

17. The Act of 1907, 7 Edward VII., Chapter 15, is in the nature of a private Act within the meaning of "The Interpretation Act" and, therefore, should be held not to affect the right of the appellants.

18. Confiscation of property without compensation is beyond the power of the local Legislature and, therefore, even if the appellants are wrong as to the construction of the said Statutes, they continue entitled to the base metals as well as to the precious metals. 20

19. The said Acts are ultra vires of the Legislature and void.

20. The said Statutes are not laws within the meaning of Section 92 of the British North America Act.

21. The said Statutes trench upon the Dominion jurisdiction to appoint Judges.

22. The said Statutes violate the fundamental constitutional rights of the appellants, including the right to justice as administered by Judges 30 beyond the control of the Provincial authorities.

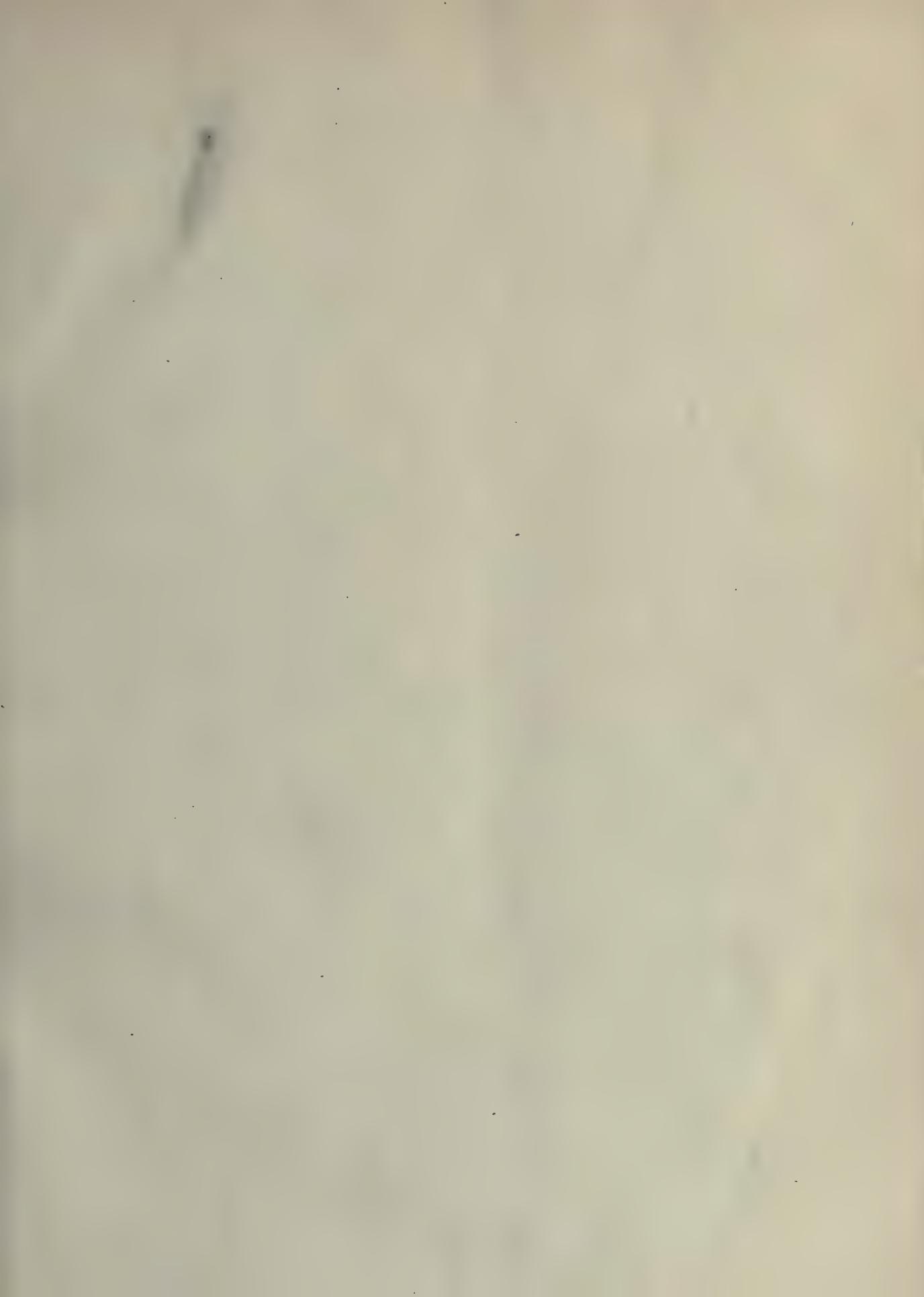
23. There is no express authority granted to the Legislature to pass legislation in violation of the pledge of the Crown that justice will not be sold, denied or delayed, and of the other provisions of the Great Charter above quoted, and such an authority will not be implied.

24. The prohibition "Thou Shalt Not Steal" is binding upon the Ontario Government and Legislature.

J. M. CLARK,

R. U. MCPHERSON,

Of Counsel for Appellants. 40



In the Privy Council.

No. 13 for 1910

**Appeal from the
Court of Appeal for Ontario.**

BETWEEN

THE FLORENCE MINING COMPANY,
(LIMITED),

APPELLANTS,

—and—

THE COBALT LAKE MINING COMPANY, (LIMITED),

RESPONDENTS.

CASE FOR THE APPELLANTS

THE FLORENCE MINING COMPANY
(LIMITED).

LAWRENCE JONES & CO.,

4 St. Mary Axe, E. C.,

Solicitors for Appellants.

In the Privy Council.

No. 13 of 1909.

ON APPEAL FROM THE COURT OF APPEAL
FOR ONTARIO.

BETWEEN

THE FLORENCE MINING COMPANY, LIMITED,
(Plaintiffs) APPELLANTS,

AND

THE COBALT LAKE MINING COMPANY, LIMITED,
(Defendants) RESPONDENTS.

10 CASE FOR THE RESPONDENTS, THE COBALT LAKE MINING COMPANY, LIMITED.

1. Prior to the year 1904 discoveries of valuable silver were made in the vicinity of a body of water known as Cobalt Lake, formerly Long Lake, situate in the Township of Coleman, in the Province of Ontario, and under The Mines Act, Revised Statutes of Ontario, Cap. 36, s. 9 and ss. 45, 46 and 47, as amended by 61 Vict., Cap. 11, secs. 1 and 2 (Ont.), lands of the Crown not withdrawn from exploration, being open for exploration to such persons as had miner's licenses, numerous mining claims were staked under the said Acts, and in 1904 the Lake and the allowance

See maps.

20 for road surrounding it were completely surrounded by such mining claims. These claims proved to be of great value, and in many cases the veins were traced on to the road allowance and in some cases on to the Lake. As a result a number of claimants attempted to stake the Lake as a mining claim by virtue of discoveries thereon or alongside thereof. Subsequently these claims, after consideration, were disallowed by the Government, and the mining inspectors, for various reasons (amongst others that the discoveries reported were of rich veins or deposits well known before the pretended discovery and that no discovery had been made within the meaning of the Mines Act).

30 2. On August 14, 1905, the Ontario Government by Order-in-Council withdrew the Lakes known as Cobalt and Kerr Lakes in the Township

R. p. 11, l. 42;

12. l. 41.

R. p. 13, l. 8.
R. p. 71, l. 1.

R. p. 89, 90, l. 6.

R. p. 79, l. 2.

of Coleman and the Gillies Limit "from exploration for mines and minerals and from sale, lease or location."

R. p. 79, l. 20.
3. On August 28, 1905, the Government by Order-in-Council withdrew such parts of the Townships of Coleman, Bucke, Lorraine and Hudson as had not already been leased and sold "from sale and lease under the Mines Act," on the ground that they were rich in minerals, and set these lands apart under sec. 33 of the said Act for the purpose of making new regulations.

R. p. 79, l. 35.
R. p. 80, l. 1.
4. On October 30, 1905, the Government by Order-in-Council declared that "notwithstanding the Order-in-Council of the 28th day of August, 1905, withdrawing from sale or lease" the parts of Townships above mentioned, "the inspector of the mining division be authorized to record " claims in the said townships under the amended regulations," etc.

R. p. 58, l. 39.
R. p. 63, l. 23.
R. p. 29, l. 37.
R. p. 64, l. 9.
R. p. 34, l. 25.
R. p. 65, l. 3.
5. On the 1st of February, 1906, one W. J. Green, the assignor to the appellants, assuming that the Lake was open for exploration, proceeded to explore and prospect Cobalt Lake by means of a diamond drill, and the appellants allege that on the 7th of March, 1906, when from indications it appeared probable that a discovery might be made, Green went to the mining inspector's office and obtained a Miner's License, and on his return stopped the drill and pulled therefrom a core which indicated that the drill 20 had struck a calcite vein bearing silver.

R. p. 61, l. 2.
R. p. 35, l. 24.
R. p. 53, l. 8.
R. p. 15, l. 36.
6. The appellants further allege that stakes were then planted in the ice on the frozen surface of the Lake and that next day application was made to the inspector to record the claim staked, which was refused on the ground that the Lake was not open for exploration, and a subsequent application to the Department was refused on like ground.

R. p. 100, l. 43.
7. By virtue of the Act passed by the Province of Ontario, being 6 Edward VII, Cap. 12, the Order-in-Council of the 14th of August, 1905, was confirmed and was declared to be effectual for all purposes therein mentioned, and though the appellants endeavoured to have the said Act 30 disallowed by the Governor-General in Council, they were not successful.

R. p. 97, l. 3.
8. The Crown having offered the said lands for sale by public tender, the respondents on the 21st day of December, 1906, acquired by purchase from the Crown the lands covered by the waters of Cobalt Lake, except certain specified portions, and a patent therefor was issued on the 15th day of January, 1907.

R. p. 100, l. 1.
9. The appellants having theretofore obtained an assignment of Green's rights, then brought this action to set aside the sale of the said lands and the Patent granted to the respondents and to have it declared that they, the appellants, were entitled to the lands covered by the waters 40 of Cobalt Lake or part of them.

10. The sale of the said lands to the respondents and the Patent therefor, and the sale of other Crown lands, were confirmed and the fee absolute in the said lands declared to be vested in the respective purchasers by an Act

only stop was for mining
Dec 69 Q 243

7 Edward VII., Cap. 15, duly passed by the Legislature of the Province of Ontario, and which it is submitted was within the power of the Province to enact.

R. p. 101 l. 1.

11. The trial of this action was postponed from time to time, the appellants having petitioned the Governor-General in Council to disallow the Act, 7 Edward VII., Cap. 15, and the petition having been refused, the trial was proceeded with on the 8th, 9th and 10th days of June, 1908, when judgment was reserved.

12. The learned trial judge delivered judgment on the 15th day of 10 June, 1908, dismissing the action on the ground that the Act, 7 Edward VII., was intra vires the authority of the Legislature of the Province of Ontario, and was a complete bar to this action. The learned trial judge says:—

R. p. 99.

“ The many difficult questions arising in respect of the interpretation of the R.S.O., Cap. 36, the right of the discoverers to prospect at all, the effect of what they did, the possibility of such an action as this being sustained in the absence of the Attorney-General, etc., I do not pass upon,”

R. p. 101, l. 29.

and it is to be noted that the learned trial judge did not have read to him 20 the evidence of Green taken *de bene esse*, nor did he hear the argument of counsel for the respondents at the trial, and the first fully considered judgment on the facts as presented by the evidence and in argument is that of the learned Chief Justice in the Court of Appeal for Ontario.

13. From this judgment the appellants appealed to the Court of Appeal for Ontario. The appeal was heard on the 5th and 8th days of February, 1909, and judgment was delivered on the 5th day of April, 1909, dismissing the appeal. From this judgment the appellants appeal to His Majesty in Council.

R. p. 116.

14. Under the Mines Act, Revised Statutes of Ontario, Cap. 36, sec. 9 30 and secs. 45, 46 and 47 as amended by 61 Vict., Cap. 11, secs. 1 and 2, such lands of the Crown as are not withdrawn from exploration may be explored by such persons as have Miner's licenses, and it is submitted that the said Green not having obtained a license before his exploration, and only as stated in paragraph 5 hereof, was not entitled to stake a claim on any lands.

15. The learned trial judge found as follows:

“ It is plain that the inspector considered that Cobalt Lake was not open for prospecting and that the same opinion was shared by the officers of the Department, including the Minister.”

40 The respondents submit that the Order of the 14th of August, withdrawing Cobalt Lake from exploration “for mines and minerals and from sale, lease or location,” was not superseded by the Order of the 28th August, withdrawing the Township of Coleman from “sale and lease” and that the Order of the 30th October reopening the Township of Coleman

"notwithstanding the Order of the 28th of August" did not affect the Order of the 14th August which remained in full force and effect thereby closing Cobalt Lake from exploration, and that Green even if duly licensed had no right to prospect these lands.

R. p. 34. l. 9.

16. The respondents further say that the said Green did not have present at the time of the withdrawal of the core above referred to an inspector to verify the same, and the appellants admit that this was necessary in order to satisfy the Mining Inspector that a discovery had been made. The respondents submit that this was fatal to the claim of the appellants, and though the learned Chief Justice of the Court of Appeal for Ontario states that another core could no doubt have been withdrawn, this is manifestly an error, since the drill having passed into the vein, a core of this vein could only be obtained by driving another drill in the same manner as the first drill had been driven, which would require at least the same length of time, namely five weeks, with no certainty that it would strike a vein where silver was carried, and with no certainty that some other person would not have made a prior discovery on the said lands which would entitle him thereto, assuming always that such lands were open for exploration.

R. p. 60. l. 6. 34; p. 61. l. 8.

17. The respondents submit that the appellants did not comply with the Act and regulations as to staking, etc.

The learned Chief Justice of the Court of Appeal for Ontario found as follows:—

"Whereas in this instance the posts were merely planted in the ice, all traces of the point of discovery and of the supposed boundaries of the claim are obliterated with the breaking up of the ice."

18. The learned Chief Justice of the Court of Appeal for Ontario has found

R. p. 123. l. 23.

"That the defendants became purchasers in good faith and for value the evidence leaves no doubt. Apparently they had no notice of the plaintiff's claim until after the acceptance of the tender and payment of the deposit, but before the payment of the balance of the purchase money and the issue of the letters patent they were aware that the plaintiffs were claiming the portion of Cobalt Lake in respect of which this action is brought and assuming the plaintiffs were able to establish a status entitled them to impeach the sale the defendants would derive no protection from the plea of purchasers for value without notice."

The respondents respectfully submit that the contract having been entered into and the deposit paid to the Government prior to notice that the appellants claimed any part of the said lands the purchasers are entitled to the protection afforded by the plea above referred to.

19. It is further submitted that the appeal should be dismissed on the ground that, the action of the appellants being one to set aside Letters Pat-

ent granted by the Crown, it cannot be sustained at the suit of a private party and without the fiat of the Attorney-General of the Province of Ontario. A certain statute, namely, 4 and 5 Vict. (Can.), Cap. 100, sec. 29, once in force in the Province of Ontario, has been construed by the Courts of that Province to permit, in cases falling within its terms, of an action by a private plaintiff without the Crown. But that statute was repealed in 1887 by 50 Vict. (Ont.), Cap. 8, schedule. Further, in 1888 there was enacted Rule 367 of the Consolidated Rules of the Supreme Court of Judicature for Ontario, now in force as Rule 241, which reads as follows:—

10 “ Notwithstanding the want of enrolment, writs of summons
 “ to repeal letters patent, grants or other matter of record under
 “ the Great Seal, shall be issued in the same cases and under the
 “ same restrictions, as nearly as may be, as writs of scire facias
 “ were on the 5th day of December, 1859, issuable from
 “ the Court of Chancery in England; and all the proceedings
 “ thereafter shall be the same as the proceedings in an ordinary
 “ action; but before the issue of any such writ, the person making
 “ application for the same shall, in addition to the fiat of the At-
 “ torney-General, file in the Court from which the writ is to be
 “ issued, an exemplification under the Great Seal of the Province
 “ of the letters patent, grant or other matter of record with re-
 “ spect to which the said writ is to be issued.”

20

The steps required by this Rule have not been taken in the present case and it is therefore submitted that the present action does not lie.

18. In 1881, by 44 Vict. (Ont.), Cap. 5, the High Court of Justice for Ontario was created, and by sec. 9 of the said Act it was enacted as follows:

30

“ The High Court of Justice shall be a Superior Court of
 “ Record, and, subject as in this Act mentioned, shall have the
 “ jurisdiction which, at the commencement of this Act, was vested
 “ in, or capable of being exercised by, the Court of Queen’s Bench,
 “ the Court of Chancery, the Court of Common Pleas, and Courts
 “ of Assize, Oyer and Terminer, and Gaol Delivery (whether cre-
 “ ated by Commission or otherwise), and shall be deemed to be and
 “ shall be a continuation of the said Courts respectively (subject
 “ to the provisions of this Act) under the name of the High Court
 “ of Justice aforesaid.”

40

But, it is submitted, this does not affect the situation as stated by the last preceding paragraph hereof. The jurisdiction of the earlier Courts as it existed at the date in question was a jurisdiction dependent on the continued existence of the statute 4 and 5 Vict. (Can.), Cap. 100, sec. 29, and that conditional jurisdiction alone was transferred to the new Court, and as the statute 4 and 5 Vic. (Can.), Cap. 100, sec. 29, is now repealed, the jurisdiction in question has, it is submitted, ceased. Or, to put the matter in another way, the question here is not, it is submitted, one of the jurisdic-

tion of the Court at all, but rather one of the status or right of the plaintiff, so that the statute 44 Vict. (Ont.), Cap. 5, sec. 9, has no application.

19. The respondents would further refer to the judgment of the learned Chief Justice of the Court of Appeal, which, setting forth as it does the facts, the conclusions to be drawn therefrom (and which the respondents submit are the proper conclusions save as to the points specially commented on before herein), renders it unnecessary for the respondents to repeat the facts and conclusions therein set forth.

20. The respondents therefore submit that the judgment of the learned trial judge affirmed by the Court of Appeal was right and should not be disturbed, and that this appeal should be dismissed for the reasons aforesaid and for the following reasons:

1. Because the Patent of the respondents has been confirmed by the Act, 7 Edward VII., Cap. 15.

2. Because the Crown is not a party to the action.

3. Because the lands included in the patent of the respondents were not open for exploration at the time of the alleged discovery by Green.

4. Because the appellants and their assignor Green were not entitled to prospect for minerals, not having obtained a license under the Mines Act.

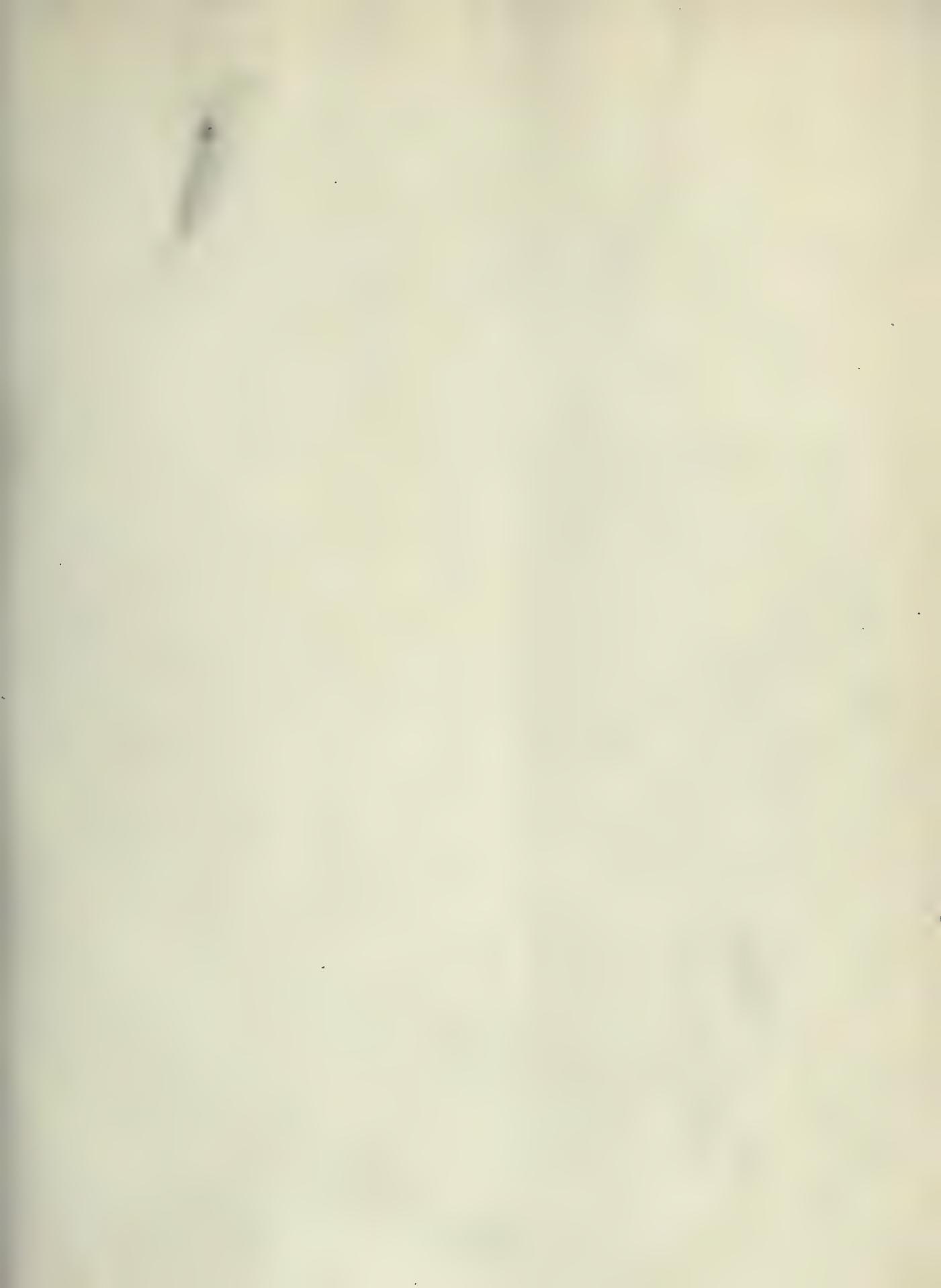
5. Because the said Green did not acquire any right which he could assign to the appellants.

6. Because the said Green failed to comply with the conditions and provisions of the Mines Act and the regulations of the Department with regard to the staking of a claim and the recording of a discovery.

7. Because the respondents were purchasers for value without notice.

BRITTON OSLER,

Of Counsel for the Appellants.



In the Privy Council.

No. 13... of 1909

On Appeal
From the Court of Appeal for Ontario.

BETWEEN

THE FLORENCE MINING COMPANY
LIMITED,

(Plaintiffs) APPELLANTS

AND

THE COBALT LAKE MINING COMPANY
LIMITED,

(Defendants) RESPONDENTS

CASE FOR THE RESPONDENTS,

THE COBALT LAKE MINING COMPANY
LIMITED.

CHARLES RUSSELL & COMPANY,

37 Norfolk Street, W.C., London,

Solicitors for the Respondents.

In the Privy Council.

No. of 1909.

**On Appeal
From the Court of Appeal for Ontario.**

BETWEEN

THE FLORENCE MINING COMPANY, LIMITED,
(Plaintiffs) APPELLANTS,

AND

THE COBALT LAKE MINING COMPANY, LIMITED,
(Defendants) RESPONDENTS.

RECORD OF PROCEEDINGS.

LAWRENCE JONES & CO.,
4 St. Mary Axe, E.C.,
Solicitors for Appellants.

CHARLES RUSSELL & CO.,
37 Norfolk Street, Strand,
Solicitors for Respondents.

In the Privy Council.

No. of 1909.

**On Appeal
From the Court of Appeal for Ontario.**

BETWEEN

THE FLORENCE MINING COMPANY, LIMITED,
(Plaintiffs) APPELLANTS,

AND

THE COBALT LAKE MINING COMPANY, LIMITED,
(Defendants) RESPONDENTS.

RECORD OF PROCEEDINGS.

LAWRENCE JONES & CO.,
4 St. Mary Axe, E.C.,
Solicitors for Appellants.

CHARLES RUSSELL & CO.,
37 Norfolk Street, Strand,
Solicitors for Respondents.

IN THE PRIVY COUNCIL.

On Appeal from the Court of Appeal for Ontario

BETWEEN

THE FLORENCE MINING COMPANY, LIMITED,
(Plaintiffs) APPELLANTS,

AND

THE COBALT LAKE MINING COMPANY, LIMITED,
(Defendants) RESPONDENTS.

RECORD OF PROCEEDINGS

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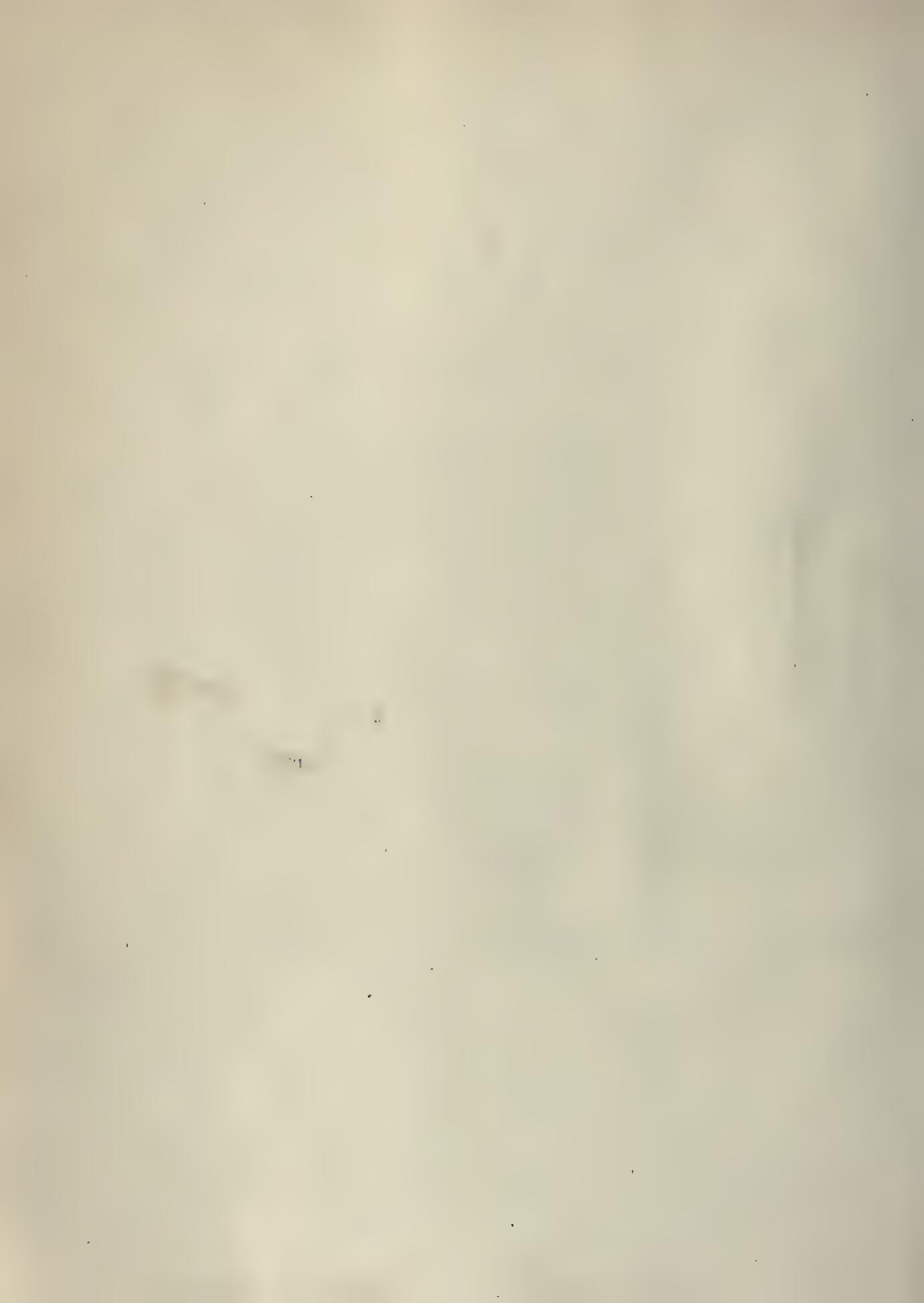
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In the Court of Appeal for Ontario.

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,

(Appellants) PLAINTIFFS;

AND

THE COBALT LAKE MINING COMPANY, LIMITED,

(Respondents) DEFENDANTS.

RECORD.

*In the
High
Court of
Justice.*

STATEMENT OF CASE.

10 This is an appeal from the Judgment of the Honourable Mr. Justice Riddell dated the Fifteenth day of June, 1908, dismissing the action of the plaintiff with costs from the 20th day of April, 1907.

No. 1.
Statement
of Case,

In the High Court of Justice.

WRIT issued the Twenty-ninth day of December, 1906.

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,

PLAINTIFFS;

AND

THE COBALT LAKE MINING COMPANY, LIMITED,

DEFENDANTS.

RECORD.

*In the
High
Court of
Justice.*

No. 2.
Statement
of Claim.
Delivered
24th January,
1907,

STATEMENT OF CLAIM.

1. The plaintiffs and defendants are both mining companies incorporated under the laws of the Province of Ontario. 10

2. On or about the month of January, 1906, William James Green, of the City of Toronto, in the County of York, broker, applied to the Department of Lands and Mines of the said Province at the City of Toronto for information in regard to the Cobalt district, being the Township of Coleman and vicinity, all in the District of Nipissing, in the said Province, and subsequently applied to the proper official of the said Department of Lands and Mines at Haileybury and received from the proper officials of the said Department at Toronto and Haileybury a set of regulations and a map shewing as the fact was that Cobalt Lake in the said Township of Coleman was then and has been ever since open for exploration and discovery within the meaning of the Mines Act. 20

3. In and by the said regulations it was represented by the Ontario Government to the said Green that if he made a discovery of valuable ore or mineral in place under Cobalt Lake he would be entitled under the Mines Act and the regulations thereunder to a mining claim of Twenty acres of the land covered by the waters of the said lake and to the minerals therein and thereunder with the right to work the same.

4. Relying upon the said representations the said Green explored part of the said territory by means of a diamond drill and as the result of the said work made a discovery of valuable ore or mineral in place under the said lake on or about the seventh day of March, 1906.

5. Forthwith thereafter the said W. J. Green staked out a mining claim in accordance with the Mines Act and regulations passed thereunder and had the same regularly surveyed by a Land Surveyor duly authorized and did every act necessary to entitle him to the said lands and minerals. The said mining claim was designated as J. S. 71 and contains about 10 twenty acres, part of the land under the waters of Cobalt Lake and being described as follows: That part of Cobalt Lake lying west of Mining Location R. L. 404, including a small island therein as shewn on the said sketch. The discovery post is two hundred and fifty-three feet south-westernly from post Number One, which is one chain west of the south-west angle of R. L. 401, the boundary from post Number One to post Number Two follows the shore line of the said lake and is consequently irregular, from post Number Two to post Number Three is seven hundred and eighteen feet north astronomically, from post Number Three to post Number Four the shore line is followed, from post Number Four to post Number 20 One is three hundred and twenty-six feet east astronomically.

6. The purchase price of the said lands was duly paid to the Crown, who received same in right of the Province of Ontario.

7. By virtue of the said discovery and compliance with the Mines Act and regulations the said W. J. Green became entitled to the said mining claim and to the minerals thereunder, with the right to work same and the right to transfer his said mining claim.

8. That on or about the 11th day of April, 1906, the said W. J. Green duly transferred the said mining claim and all his rights arising out of the said representations and discovery to the plaintiffs, who are now the owners 30 thereof and entitled thereto.

9. The defendants with full notice and knowledge of the plaintiffs' said rights applied to and obtained from the Ontario Government in the month of January, 1907, a grant of lands, including the plaintiff's said land and mining claim.

10. The plaintiffs further allege and as the fact is that the Township of Coleman within which Cobalt Lake is included and of which it forms part was on the 30th day of October, 1905, set apart as a special mining division and thereafter the said lands could only be dealt with under the Mines Act and the regulations passed thereunder and could not legally 40 be granted except to bona fide discoverers.

11. The plaintiffs allege as the fact is that no discovery of valuable ore or mineral in place was made by the defendants or on their behalf on the said lands granted to them within the meaning of the Mines Act and the regulations passed thereunder prior to the issue of the said Letters Patent to the defendants.

12. On the contrary the said Letters Patent in favor of the defendants

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of Claim,
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were issued in violation of the Mines Act and regulations passed thereunder and such Letters Patent purporting to grant the lands and minerals to which the plaintiffs are entitled, was wholly without any legislative authority and beyond the power of the Ontario Government.

13. The plaintiffs allege as the fact is that the said Letters Patent in favor of the defendants were issued erroneously and by mistake and improvidently and that the said Letters Patent by reason thereof are utterly void as against the plaintiffs.

14. The plaintiffs also allege that the said Letters Patent to the defendants and the defendants' rights thereunder, if any, are subject to the 10 plaintiffs' rights to the said lands and minerals.

15. The plaintiffs allege as the fact is that the area granted to the defendants by the said Letters Patent exceeds the quantity authorized by law and that the said Letters Patent are therefore invalid—such excess area is more than the plaintiffs' said lands.

16. If the said Letters Patent to the defendants should be held not to be wholly invalid the plaintiffs' claim in the alternative that the said Letters Patent should be held valid only as to the Lands therein described other than the lands claimed by the plaintiffs and their operation confined to the maximum area authorized by the Mines Act.

17. By virtue of the matters hereinbefore alleged the plaintiffs acquired under the provisions of the Mines Act and Regulations a statutory grant or right from the Province of the mining claim above described and the minerals thereunder, and the subsequent grant thereof to the defendants in derogation of the rights previously granted to the plaintiffs could not be validly made.

18. All times have elapsed, all things have been done and all conditions performed to entitle the plaintiffs to the said mining claim and minerals and to the relief claimed herein.

THE PLAINTIFFS THEREFORE CLAIM:

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(1) A declaration that the said Letters Patent to the defendants were issued erroneously by mistake and improvidently and are utterly void as against the plaintiffs, and that the plaintiffs are entitled to the said lands and minerals.

(2) A declaration that the defendants' rights, if any, under the said Letters Patent are subject to the plaintiffs' said rights.

(3) An injunction restraining the defendants, their servants, workmen or agents, from extracting or removing any ore or minerals from the said Mining Claim J. S. 71 or from in any way interfering with the plaintiffs' exclusive right of possession thereof.

40

(4) An account of all ore or minerals that may be extracted or removed from the said lands or any part thereof.

(5) A judgment setting aside as ultra vires and void the Letters

Patent in favor of the defendants as against the plaintiffs, or in the alternative, confining the operation thereof to the lands therein described other than the lands claimed by the plaintiffs.

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Justice.*

(6) Their costs of this action.

(7) Such further and other relief as the Court may deem expedient.

The plaintiffs propose that this action should be tried at the City of Toronto.

DELIVERED this 24th day of January, A.D., 1907, by Messrs. 10 Clark, McPherson, Campbell & Jarvis, 16 King Street West, in the City of Toronto, Solicitors for the Plaintiffs.

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—*continued*

IN THE HIGH COURT OF JUSTICE.

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,

PLAINTIFFS;

AND

THE COBALT LAKE MINING COMPANY, LIMITED,

DEFENDANTS.

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Justice.**Nº. 3.
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6th Febru-
ary, 1907.*

STATEMENT OF DEFENCE.

1. The defendants deny all allegations contained in the Statement of Claim save such as are specifically admitted herein. 10
2. The defendants in answer to the Statement of Claim say that the land covered with water, known as Cobalt Lake was not open for exploration, discovery and staking at the time when the alleged discovery, under which the plaintiffs' claim was made, nor was the same of such a character that it could be explored, discovered and staked out, within the meaning of The Mines Act.
3. If the said lands known as Cobalt Lake were open for exploration, discovery and staking, then the said Green, who is alleged to have made the discovery, did not observe the provisions of The Mines Act in any respect and the said Green never had, nor have the plaintiffs as claiming under him, any right to the minerals on or in the said lands. 20
4. If the said lands were so open for exploration, discovery and staking and if the said Cobalt Lake was of such a character as to be within The Mines Act, and if the said Green did in fact observe the provisions of The Mines Act and did acquire a title to the minerals therein, then the defendants say that by virtue of an Act passed in the 6th year of His Majesty King Edward VII., Chapter 12 the said lands having been withdrawn from exploration, discovery and staking by Orders in Council, the same were confirmed and the discoveries made, if any, were rendered void as against the lands, and claims of such discoveries, if any, were directed to be dealt 30

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of Defence,
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with by the Honourable, the Lieutenant-Governor in Council as he might see fit, and in consequence thereof the plaintiffs claiming under the said Green have no right, title or interest in or to the said minerals and mining rights and have no right or title to maintain this action and this Honourable Court has no jurisdiction to entertain any claim of the plaintiffs respecting the same, but the same must be dealt with by His Honour The Lieutenant-Governor in Council.

5. In any event the Attorney-General of the Province is a necessary party to this action and the same is not properly constituted without him.

10 6. The right or claim of the said Green, if any, was never transferred to the plaintiffs.

7. In answer to the 10th paragraph of the Statement of Claim, the defendants say that there was and is no prohibition in The Mines Act against the Crown's selling part of the public domain for mining purposes which is not open for exploration and the Crown has a right, while the said lands were withdrawn from the Mines Act and without opening the same for exploration to sell the same in the manner in which they have been sold and the defendants further say that this action is defective for want of parties and this issue as well as the foregoing issues cannot be determined in the absence of the Attorney-General.

20 8. During the months of November and December, 1906, and while the said lands were withdrawn from exploration, the Ontario Government offered for sale by public tender the land covered by the water of Cobalt Lake situate in the Township of Coleman. Public notice of such offer was given by advertisement containing a full description of the said lands so offered and the terms and conditions to be complied with in tendering for the same, which advertisement appeared on or about the 22nd day of November, and from the said date up to the 20th day of December, the last day stated for the receiving of tenders, at least bi-weekly in the daily news-30 papers published in the principal cities of Ontario and also in other newspapers and publications in the Province of Ontario and elsewhere.

9. Pursuant to the said advertisement a sealed tender was deposited with the Government by Sir Henry Pellatt, Thomas Birkett, George F. Henderson, John H. Avery, Britton Osler, Raymond Mancha and D. B. Rochester, on the said 20th day of December, by which the said parties did offer the sum of \$1,085,000 for the said lands and did pay the sum of \$108,500; being 10 per cent. of the amount of the said tender as required by the terms and conditions set out in the said advertisement.

10. On or about the 21st day of December the said parties were notified by the Ontario Government that their said tender was accepted and that the balance of the purchase money must be paid on or before the fourth day of January as required by the terms and conditions of the said advertisement and tender and the balance of the said sum of \$1,085,000 was in due course paid to and received by the said Ontario Government.

11. Subsequently the said parties did by an agreement dated the Twenty-seventh day of December, 1906, sell and transfer to the defendants the

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said property for the price or sum of \$3,635,000 and the said parties did authorize the Ontario Government to issue and the said Government in pursuance of and to carry out the said sale did issue to the defendants a patent for the said lands in fee simple, including all mines and minerals thereon.

12. In answer to the plaintiffs' Statement of Claim the defendants allege as the fact is that during the whole period from the 22nd day of November to the 28th day of December the said plaintiffs well knowing that the said lands were being sold by tender did not, nor did any one on that behalf so far as the said defendants are aware, give any notice that they, 10 the said plaintiffs had any claim to the lands in question herein nor did they attempt to inform any tenderers that such a claim existed or that they intended in any way to interfere with the sale of the said lands by the Ontario Government, but stood by and allowed the defendants to pay the whole purchase money and other crown dues and if the plaintiffs ever had any right, title or claim, they are now estopped from setting it up as against the defendants.

13. In further answer to the Statement of Claim herein the defendants allege as the fact is that any claim which the said plaintiffs may have had was made and presented to the Ontario Government prior to the offering 20 of the said property for sale and the same was duly considered by the Crown and disallowed and the Letters Patent issued to the defendants herein were issued after the consideration of any claims outstanding and with full knowledge of the matters involved and were not issued improvidently or wrongfully.

DELIVERED this sixth day of February, 1907, by McCarthy, Osler, Hoskin & Harcourt, Solicitors for the Defendants.

REPLY.

No. 4.
Joinder of
Issue and
Reply,
Delivered
1st March,
1907.

1. The plaintiffs join issue upon the Statement of Defence herein. 30

2. By way of reply to the Statement of Defence the plaintiffs allege as the fact is that the provisions of the Mines Act and regulations were observed in all respects and if the Mining Recorder or other official declined or refused to record the claim in accordance with the Mines Act and regulations the plaintiffs are not prejudiced thereby and the said Green and the plaintiffs have always been and still are ready and willing in all respects to observe and perform the conditions of the Mines Act and regulations and have offered and hereby offer so to do.

3. By way of further reply to the Statement of Defence the plaintiffs allege that the Statute and Order-in-Council referred to in the Statement 40 of Defence apply only to discoveries or claims made on or before the 14th day of August, 1905, and only to Cobalt Lake and not to the lands or minerals thereunder which were not at any time withdrawn from exploration.

4. By way of further reply to the Statement of Defence the plaintiffs allege as the fact is that the Letters Patent in question herein were issued

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Reply,
Delivered
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direct to the defendants in consideration of the individuals mentioned in the ninth paragraph of the Statement of Defence who were promoters of the defendant Company being paid by the defendants \$3,635,000 in cash or stock being \$2,550,000 in excess of the sum of \$1,085,000 alleged to have been paid by them to the Government and in consideration of such additional amount said individuals assumed the risk of and agreed to protect the defendant Company against the defect in the title to the said lands which the defendants and the said promoters knew existed by reason of the plaintiffs' claim herein.

10 5. By way of further reply to the Statement of Defence the plaintiffs say that the said promoters had full information of the plaintiffs' claim before the said Patent was issued or any part of the purchase money was paid and prior to the issue of the Patent applied to the Government to guarantee the title to the said lands and indemnify them and the defendants against the plaintiffs' claim and obtained from the Government a Charter with an authorized capital of \$5,000,000 with a view to enable the defendants and the said promoters to sell the shares of the defendants to the public on such a basis as would compensate them for their loss or responsibility in connection with the plaintiffs' right to the said twenty

20 20 acres and the defendants with full knowledge of the plaintiffs' said claim and of the facts and circumstances herein alleged ratified and adopted the acts of the said promoters and by reason thereof are estopped from denying the plaintiffs' right to said twenty acres.

6. The plaintiffs contend that the Statement of Defence discloses no answer in law to the plaintiffs' claim and will claim the same benefit as would formerly have been allowed on a demurrer to the Statement of Defence.

7. By way of further reply to the Statement of Defence the plaintiffs say that the Statute referred to in the Statement of Defence in so far as it pretends to authorize the Government of Ontario to deal with Cobalt Lake, which is a body of navigable water subject to the exclusive jurisdiction of the Dominion and also in so far as it purports to confiscate the vested rights of the plaintiffs, is ultra vires of the Legislature of the Province and that the alleged Patent granted thereunder is null and void.

DELIVERED this First day of March, A.D. 1907, by Messrs. Clark, McPherson, Campbell & Jarvis, of No. 16 King Street, West, in the City of Toronto, solicitors for the plaintiffs.

In the High Court of Justice

Before the Honourable Mr. Justice Riddell.

BETWEEN :

THE FLORENCE MINING COMPANY, LIMITED,

PLAINTIFFS;

AND

THE COBALT LAKE MINING COMPANY, LIMITED,

DEFENDANTS.

COUNSEL:

J. M. CLARK, K.C.	10	For Plaintiffs.
S. H. BRADFORD, K.C.		
R. U. MCPHERSON.		

E. D. ARMOUR, K.C.	For Attorney General.
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G. F. Henderson, K.C.	For Defendants.
BRITTON OSLER.	

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Court of
Justice.*

No. 5.
Evidence of
Thomas W.
Gibson.
Examined
by Mr.
Armour.

Toronto, June 8th, 1908.

THOMAS WILLIAM GIBSON, sworn, examined by Mr. Armour:

Q. What is your position, Mr. Gibson? A. I am Deputy Minister of Mines.

Q. And what are your duties with regard to mining claims? A. General supervision over the administration of the Crown Lands for mining purposes. 20

Q. Do you know these Cobalt Lake—so called—mining claims? A. Yes sir.

Q. Have you any application there, from the Department, showing discoveries or claiming to show discoveries?

MR. ARMOUR: There is a notice served on the Attorney General raising Constitutional questions, and I appear for him, My Lord.

MR. HENDERSON: I appear for the Company with Mr. Osler.

MR. ARMOUR: Q. What is the earliest one, Mr. Gibson? A. There is an application on file from William C. Chambers.

Q. What date? A. It is dated the 18th of January, 1904, signed by J. B. O'Brien, on behalf of William Clark Chambers.

Q. Does that show where the discovery is alleged to have taken place? A. I think not, except the application is accompanied by a sketch showing 10 a part of the lot applied for.

Q. Show me the part alleged? A. This application don't allege discovery of mineral in the actual bed of the lake.

Q. Show me where it is alleged discovery was made? A. It would be necessary to read the annexed affidavit for that purpose. I suppose that is the only way. I have no objection to my saying there was an application based on no discovery.

MR. ARMOUR: What we want to call Mr. Gibson for is, there were other alleged discoveries before the claim of the plaintiffs, so that he could not be claimed to be the first.

20 HIS LORDSHIP: That would be proved on the documents themselves.

Exhibit Number 1 application on behalf of William Clark Chambers.

MR. ARMOUR: Q. Is there anything in the Department by which you can identify the place where the discovery is claimed? A. The discovery so far as any discovery is alleged on these papers, is on the dry land and not on the bed of the lake.

Q. How far from the lake? A. About two hundred feet. Paragraph 2 of the affidavit accompanying the application states, the mineral veins discovered on said location run approximately east and west and to my certain knowledge one of them out-crops within two hundred feet of the 30 shore of Long Lake, and I believe it will be eventually traced across the road allowance and under the lake.

Q. What is Long Lake? A. Now called Cobalt Lake, R.L. 404.

Q. And where is R.L. 404? A. On the land on the east shore of the lake.

Q. Now does that exhaust that particular application? A. I think so, for your purposes.

MR. ARMOUR: I suppose we may substitute copies for these, My Lord.

WITNESS: I would not like to have any originals go out of my possession.

40 MR. ARMOUR: We can arrange that.

(Attached to Exhibit Number 1, copy of Chambers' Application, papers dated the 18th of January, 1904.)

MR. ARMOUR: The next application is what? A. The application itself is dated 5th of May, 1905, by Milo H. Bessey.

Q. And how is that entitled? A. "Re Cobalt Lake."

Q. That is the letter accompanying it? A. This is the application in itself.

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Q. Now what is the application for? A. The application is for that body of water lying within the Township of Coleman in the District of Nipissing and Province of Ontario known and described on the map or plan of said Township as Cobalt Lake, together with the land lying and situated underneath the said lake. That is accompanied by a plan or map.

Q. Accompanied by a blueprint? A. I may say that this document I have in my hand purports to be a duplicate of the application filed by Mr. Bessey in the office of the Recorder at Haileybury, and this was forwarded to the Department by Messrs. Masten, Starr & Spence, in their letter of 10 June 16th, 1905.

Exhibit Number 2 Application Milo H. Bessey, dated 5th of May, 1905.

WITNESS: And subsequently other papers were forwarded in connection with the same application.

Q. Just supplementary papers? A. Affidavits.

Q. Let us see what the affidavits state.

MR. CLARK: I object to that going in as evidence of anything more than what is the contents of the affidavit.

WITNESS: There is an affidavit by Milo H. Bessey setting forth the particulars of his discovery.

MR. ARMOUR: Q. Claiming a discovery there? A. Yes.

Q. In the lake? A. Yes sir, dated the 15th July, 1905. Also an affidavit of David St. Elroy, corroborative.

MR. ARMOUR: That had better go in as part of Exhibit number 2.

WITNESS: Then the statement made by Bessey himself was put in, re the application presented to the Recorder at Haileybury, was forwarded to the Department by him, the original of which I read previous, sent in by Masten & Spence.

MR. ARMOUR: They are the same? A. I assume so, I have not compared them.

HIS LORDSHIP: That will be part of Exhibit number 2.

MR. ARMOUR: Is there any other application? A. For the road allowance around the lake.

Q. Would that include any part of the lake? A. Well, I think this did purport to include the lake.

HIS LORDSHIP: It is the rod wide strip around the lake? A. Yes, the road allowance around the lake, which would not cover any part of the lake bed proper.

MR. HENDERSON: The Act cuts off the road allowance, the location on each side.

This application is made on behalf of Milo H. Bessey and H. Dreany, dated 21st of July, 1905.

Exhibit Number 3 Application Bessey and Dreany, dated 21st of July, 1905.

MR. CLARK: My objection, My Lord, applies to this, without repeating it.

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MR. ARMOUR: I suppose everything will be subject to objection.

Q. Any other applications for alleged discovery? A. I think that exhausts them.

Q. Are you aware whether these were disposed of officially? A. Yes sir.

Q. What is the disposition made of them?

HIS LORDSHIP: That is of record I suppose.

MR. ARMOUR: Q. Is there any record in your Department? A. There is an Order-in-Council disallowing the Dreany claim, and the Chambers 10 claim was disallowed because it did not show discovery.

HIS LORDSHIP: Disallowing the Dreany claim, that is Bessey and Dreany? A. Yes sir.

Q. And the first one you say was not allowed by whom? A. By the Department.

Q. On what ground? A. No discovery was alleged.

HIS LORDSHIP: What about number 2, the first Bessey one? A. They were all the same thing sir.

Q. You cannot say that, because number 3 was Bessey and Dreany for a road allowance, and not the lake? A. I say the Dreany application was 20 disallowed. It refers to the bed of the lake, not that the application was only for the road allowance.

MR. ARMOUR: According to Mr. Clark, that included the other.

HIS LORDSHIP: Is it admitted the second was disallowed?

MR. ARMOUR: I think they were all disallowed for some reason or other.

WITNESS: Yes.

Q. Now was that on any report made by an inspector, or the papers themselves? A. You are speaking as to which application?

Q. Take Chambers first? A. There was no report on Chambers' application. 30

Q. Was there any on number 2, Bessey? A. Yes sir.

Q. Was it on the report that the disallowance took place, or on the papers themselves? A. Well, the disallowance—an Order-in-Council was passed largely I think upon the report of the inspectors who examined the claim.

Q. Have you the report there? A. There is a report by E. T. Corquhill, Inspector of Mines.

Q. That is produced is it? A. Yes sir, dated 17th of August, 1905.

Exhibit Number 4 Report of Inspector dated 17th August, 1905.

Q. That is produced is it? A. Yes sir, dated 17th August, 1905, with accompanying letter by the Recorder, George T. Smith.

Q. That was but one out of the three? A. I think that was all of them.

Q. Is that the only one that was reported on by the Mining Inspector? A. There was another report on the same claim.

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Q. On the same claim? A. Yes sir.

Q. What date is that? A. On the 25th of August, 1906, Inspector G.

R. Mickle and A. H. A. Robinson reported on the claim.

HIS LORDSHIP: Adversely? A. Yes sir.

Exhibit Number 5 Mickle and Robinson report dated 25th of August, 1906.

MR. ARMOUR: Any other reports? A. No sir.

Q. Then was there a claim received from Mr. Green? A. Yes sir.

Q. In the Department—when was that received?

HIS LORDSHIP: That is an application I take it?

MR. ARMOUR: An application I should say? A. There was an application which was forwarded to the Department by the Recorder at Haileybury from William James Green.

Q. What was the date of that? A. Dated 8th of March, 1906.

Q. Was there any report made on that? A. No sir.

Q. This claim is that part of Cobalt Lake including a small island.

MR. CLARK: That is the claim in question.

Exhibit Number 6 Application William James Green dated 8th March, 1906.

MR. ARMOUR: Q. What disposition was made of that, or was any disposition made by the Department? A. It was disallowed.

Q. The grounds of disallowance? A. I think that claim was disallowed.

Q. By Order-in-Council? A. The Order-in-Council of 22nd of November, 1906, disallowed both the Bessey and Green claims.

HIS LORDSHIP: Dated when? A. 22nd of November, 1906.

Q. Disallowing Bessey—that is Numbers 2 and 3?

MR. ARMOUR: Bessey would be Number 2. And Bessey and Dreany? A. Number 3.

Q. And Green is 6. That is 2, 3 and 6?

WITNESS: Shall I read it?

HIS LORDSHIP: No, we can get that later on.

MR. ARMOUR: It is just stated, on law and facts it cannot be accepted.

Exhibit Number 7 Disallowance dated 22nd of November, 1906.

Q. Was it Mickle and Corquehill's report you read a moment ago? A. Corquehill reported separately, Mickle and Robinson reported together.

CROSS-EXAMINED by Mr. Clark:

Q. This is your letter, Mr. Gibson, in regard to that? A. Yes sir.

HIS LORDSHIP: The date?

MR. CLARK: 16th March, 1906, My Lord stating the Department is not prepared to consider Mr. Green's claim.

Exhibit Number 8 Letter 16th March, 1906, from T. W. Gibson.

Q. This is also your letter? A. Yes sir.

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HIS LORDSHIP: The date?

MR. CLARK: 22nd of March, 1906, My Lord.

Exhibit Number 9 Letter T. W. Gibson 22nd of March, 1906.

MR. CLARK: Q. That refers to certain evidence that was sent to your Department, Mr. Gibson, does it not? A. Yes sir.

Q. And that was returned to the applicant? A. Yes sir.

Q. Returned? A. Returned to his solicitors I think.

Q. Returned to the solicitors for the applicant which had been sent twice, and then returned? A. That is my recollection of it.

10 Q. That is your recollection, so that the evidence submitted to the Department was returned before the consideration that you referred to, long before the Order-in-Council? A. Long before the Order-in-Council, yes.

HIS LORDSHIP: Then the Government, the Executive Council made this order, with a full knowledge of all the evidence which could be produced by Mr. Green—that is that he had produced?

MR. CLARK: No, no, My Lord.

HIS LORDSHIP: I understood that it was sent up to him and returned?

A. Returned immediately.

HIS LORDSHIP: Was that brought before the attention of the Executive? A. Before the attention of the Minister of the Department.

HIS LORDSHIP: Who was that? A. At that time it would be the Honourable Mr. Cochrane.

Q. The present Minister of Mines? A. Yes.

Q. That is all, your Department just brings it before the Minister of the particular department, and then it is in his province to bring it before the Executive? A. That is it, yes sir.

MR. CLARK: Q. It is not the practice to return the evidence and say you will not consider it? A. I suppose that depends upon the case with which the Department is dealing. There is no rule.

30 Q. You do not know any other case where the evidence was returned with the refusal to consider it? A. I do not know that I do.

Q. And the Department, what ground did the Department take at that time in regard to the Green application? A. That the bed of the lake was not open for application.

Q. Was not open for exploration? A. Yes sir.

Q. So that shortly the position of your Department was that you did not consider the bed of the lake open for exploration, and you did not consider Mr. Green's application? A. That was the position.

Q. So it never was considered? A. The application was considered.

40 Q. Without the evidence? A. The evidence was returned because it was not considered an application the Department could entertain.

HIS LORDSHIP: It was returned because the Government considered that was an application they could not grant and did not intend to grant and did not bother themselves about it? A. I think that is as I understand it.

MR. CLARK: I think that makes that clear, Mr. Gibson.

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HIS LORDSHIP: Q. And did they ultimately change their view and consider that the bed of the lake was open, as a matter of history? A. I think not sir.

Q. Very well? A. I would like to be clear about that, after the Order-in-Council was passed disallowing the claim, there was no re-consideration of the position.

Q. Do you know?

MR. CLARK: I do not know if I need formally to prove the license. You know Mr. Smith's signature to this? A. I believe that to be his signature.

10

Q. That is Mr. Green's license?

MR. ARMOUR: What is the date?

MR. CLARK: Dated 7th March, 1906.

Exhibit Number 10 License issued to Green dated 7th March, 1906.

HIS LORDSHIP: You mean prospector's license?

MR. CLARK: Yes, license to prospector.

Q. Then that is the receipt of your Department for this? A. For which?

Q. For seventy dollars paid on the claim, mining location and Green claim.

20

HIS LORDSHIP: But this was returned.

MR. CLARK: The cheque for it was returned? A. Yes, it was refunded.

Q. When you say returned, you mean that they sent the cheque which was refused by us? A. That would be the ordinary course, and no doubt that was done, although it was done by the Treasury Department.

Q. You asked the Treasury Department to send a cheque? A. Yes.

Q. And you know from the correspondence the cheque was never used? A. I cannot say as to that.

Exhibit Number 11 Receipt of Department for seventy dollars.

30

MR. CLARK: I might as well put in this license. These are all regular, My Lord.

Exhibit Number 12 Licenses (three).

Q. Now, the total area of the lake was forty-six acres, of Cobalt Lake? A. No sir, it was more than that.

Q. How much was it altogether? A. My recollection is it was fifty-six acres.

Q. That is including what was given to the McKinley-Darragh?

Q. Fifty-six acres altogether, do you know the area of Kerr Lake?

A. I cannot say offhand what the area is.

Q. Less than one hundred acres? A. It was less than Cobalt Lake I think.

Q. Then have you got the Ruling of July, 1905, in regard to Cobalt Lake here, among your papers, Mr. Gibson? A. Which do you mean?

Q. Instructing the Inspector? A. No, I have looked for that but it does not appear to be on the file, Mr. Clark.

Q. There were instructions sent, pursuant to that? A. Yes sir.

40

McK D 51 ac.
4 ac
55 ac *Kerr Lake less.*

RECORD.

*In the
High
Court of
Justice.*No. 5.
Evidence of
Thomas W.
Gibson,
Cross-ex-
amined
by Mr.
Clark,
—continued

Q. That is in July, 1905? A. I think so, I think it was in July.

Q. Have you a copy of the instructions here, that would be sufficient probably?

HIS LORDSHIP: Would that be instructions to the Inspector?

MR. CLARK: Called Inspector or Recorder.

HIS LORDSHIP: Which?

MR. CLARK: He should be called Inspector.

HIS LORDSHIP: They are different people.

MR. CLARK: Not at that time, they are the same.

10 WITNESS: We called him Recorder, even without regard to the different case. That is the most convenient name, there are other officers called inspectors.

MR. CLARK: Others have been appointed since? A. Yes sir. I do not seem to have a copy here, at least it is not in its proper order.

Q. That can be put in? A. Yes.

MR. CLARK: The Ruling of July, 1905, and the instructions to the Inspector would be sufficient.

HIS LORDSHIP: Now what do you want? Do you want the Ruling as well, so that Mr. Gibson will understand it?

20 MR. CLARK: I would like to get the Ruling as well if I can get it.

MR. OSLER: What Ruling?

MR. CLARK: That Cobalt Lake was open. There was a Ruling that the Inspector might receive and record applications for Cobalt Lake if he considered he had evidence that discoveries had taken place.

Q. That was in 1905? A. That was in 1905, or my recollection is that.

MR. CLARK: I would like to have both put in, but I think the instructions would answer the purpose, My Lord.

Instructions to Inspector regarding Cobalt Lake to be marked Exhibit 30 13 when produced.

WITNESS: If you will give me a note of it afterwards.

HIS LORDSHIP: The Department has nothing to conceal in this matter.

WITNESS: Certainly not.

MR. CLARK: Q. Then you have a letter in the end of December, Mr. Gibson, protesting against the sale, December, 1906?

HIS LORDSHIP: Now let me understand this, before we get any further. The enquiry will be very wide reaching apparently. Is the Attorney General consenting to be made a party or merely here watching the case?

40 MR. ARMOUR: No, My Lord, there was a Notice of Motion served on the Attorney General claiming a certain act of the legislature was unconstitutional and alleging the grounds, and I appear for him on that application.

HIS LORDSHIP: But he is not a party to the application?

MR. ARMOUR: No, My Lord.

HIS LORDSHIP: Nor has a fiat been granted?

RECORD.

*In the
High
Court of
Justice.**No. 5.
Evidence of
Thomas W.
Gibson.
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amined
by Mr.
Clark,
—continued*

MR. ARMOUR: No, My Lord.

HIS LORDSHIP: Then the proposition is I shall consider the right of the legislature to pass the Act in question, their constitutional power.

MR. CLARK: If Your Lordship holds that it applies to us under the Interpretation Act.

HIS LORDSHIP: Then do I also consider the power of the Executive Council to pass the Order-in-Council in question, and the effect of the Order-in-Council?

MR. CLARK: The Order-in-Council in regard to our claim?

HIS LORDSHIP: Yes, I just want to see what I have to find out. Do I 10 have to go into the question of bona fides on the part of any of the officers of the Department or of the Ministers—that I suppose you cannot advance?

MR. CLARK: Beyond the question they refused absolutely to consider.

HIS LORDSHIP: That may be a mistake, although you cannot say it was corrupt.

MR. CLARK: What I am going to ask Your Lordship is this, the Department took the position that this lake was not open. We say that it clearly was open.

HIS LORDSHIP: You say that it was a mistake?

MR. CLARK: Yes, My Lord, and that is the position, the Department frankly told us, "We do not consider the lake is open and we won't consider your application."

HIS LORDSHIP: Then you say the Order-in-Council having been made under a mistake as to what the lake was, and therefore as to what the fact was, it was invalid.

MR. CLARK: Yes, My Lord.

MR. ARMOUR: There was a mistake made in the pleadings, My Lord.

HIS LORDSHIP: I think I see what it all means.

MR. CLARK: This is a letter from me in regard to it.

HIS LORDSHIP: Cannot you put in all that correspondence and let Mr. Gibson go. I suppose it will all have to be read sometime.

MR. CLARK: I can attach it together.

MR. ARMOUR: I understand it is not evidence against us, My Lord.

HIS LORDSHIP: Only about ten per cent. of documents put in are evidence. I am taking everything subject to objection. Documents are being produced and put in all subject to objection.

MR. CLARK: Q. This is the letter. I want the letter and the letter to which that is an answer put in as one exhibit, that is letter of the 29th of November, 1906, and two replies, one was sent to the Premier, one original and one a copy.

Exhibit Number 14 Letter November 29th, 1906, with reply.

MR. CLARK: Q. Then have you got the letter enclosing the ninety per cent. of the purchase money? A. By whom?

Q. Written by the Cobalt Lake Company or their solicitors? A. Yes, the ninety per cent.

*In the
High
Court of
Justice.*

No. 5.
Evidence of
Thomas W.
Gibson,
Cross-ex-
amined
by Mr.
Clark,
—continued

Q. The ninety per cent. paid in January? A. What is the date of it?

Q. January, 1907? A. What date in January?

Q. This is January 4th, 1906, the letter of the defendants enclosing the balance of the purchase money and referring to the claims of the Florence Company. The date should be 1907—that was received in January, 1907—I see it is 1906? A. Yes sir.

Q. The date there is evidently intended for 1907? A. Yes, it was a mistake.

Exhibit Number 15 Letter January 4th, 1907.

10 Q. Then the ground, Mr. Gibson, upon which the Department proceeded, was the Order-in-Council of 1905, the 14th of August. You claim that that withdrew the lake and kept it withdrawn? A. I would rather speak of the acts of the Department than the ground upon which they proceeded, because that is largely a matter of policy.

Q. Then after that, you passed the Order-in-Council on the 30th October, 1906?

HIS LORDSHIP: You mean the Order-in-Council was passed, you have nothing to do with the government? A. No, I am only a Deputy Minister.

20 MR. CLARK: I am putting in a certified copy of that Order-in-Council of the 30th of October, opening up the four townships.

HIS LORDSHIP: 1906?

MR. CLARK: 1905, My Lord, 30th October, 1905.

Q. That remained in force until after the Patent in question was issued upon it? A. So far as I know.

HIS LORDSHIP: What is the Patent in question, the Patent to the defendants?

MR. CLARK: Yes, My Lord.

HIS LORDSHIP: Have you that Order-in-Council of the 30th of October, 30 1905?

MR. CLARK: Yes, My Lord.

Exhibit Number 17 Copy Order-in-Council 30th October, 1905.

HIS LORDSHIP: Surely we are taking up a tremendous lot of time for no use. What is the use of asking this man all these things?

MR. ARMOUR: They are all matters there cannot be any dispute about.

MR. CLARK: Q. And now that Order-in-Council created a separate mining division of the Township of Coleman?

MR. ARMOUR: That speaks for itself.

40 MR. CLARK: Q. And Cobalt Lake is in that mining division? A. Cobalt Lake is in the Township of Coleman.

No. 5.
Evidence of
Thomas W.
Gibson,
Re-exam-
ined
by Mr.
Armour,

RE-EXAMINED by Mr. Armour:

Q. That money, seventy dollars, that was sent in, did that go to you or to the Treasurer? Just look at the receipt?

HIS LORDSHIP: You say it came to your Department and was trans-

RECORD.

*In the
High
Court of
Justice.**No. 5.
Evidence of
Thomas W.
Gibson,
Re-exam-
ined
by Mr.
Armour,
—continued*

ferred to the Treasurer? A. Yes sir. It was received by the Department of Lands and Mines, and deposited by them in the Treasury in the ordinary course of business.

MR. ARMOUR: Q. Would that come before you personally or before anyone who would know whether this was a claim or not? A. I was not aware this was received until after it had been received and deposited in the Treasury Department.

Q. And when that was discovered, what was done? A. It was returned, an order was made on the Treasurer, and it was returned.

HIS LORDSHIP: Am I to understand the practice when money comes 10 into the Department what is done when a cheque comes to you? A. It is entered in the Cash Collection Book and deposited with the Treasurer along with other moneys.

Q. Do you actually take it over yourself? A. Yes, the cheques and money, and evidences of money are all taken by a clerk whose business it is, are all taken to the Department with a deposit slip just the same as if he was a clerk in the Bank.

MR. ARMOUR: Q. And when you discovered this payment you had it returned by the Treasurer? A. Yes sir.

Q. You cannot say whether that cheque has been cashed by the Treasurer? A. I cannot say that. 20

CROSS-EXAMINED by Mr. Clark:

*No. 5.
Evidence of
Thomas W.
Gibson,
Further
Cross-ex-
amined by
Mr. Clark.*

MR. CLARK: This book contains a regulation, My Lord, I should have asked him. It is issued officially, printed by the King's printer.

WITNESS: Let me see it, yes.

HIS LORDSHIP: Exhibit Number 16.

MR. CLARK: Q. That contains the regulation? A. That appears to be a copy. I may say it was amended at different times.

HIS LORDSHIP: Anything more from this gentleman?

MR. ARMOUR: If my learned friend is going to use that for the purpose of showing it was issued by the Crown, or only the Order-in-Council? 30

HIS LORDSHIP: No, he wants to prove the regulation.

MR. ARMOUR: Q. What are these rules? A. These purport in the main to be the regulations in regard to mining divisions.

HIS LORDSHIP: Are they? A. Yes, but I think they contain other things.

HIS LORDSHIP: They are amended from time to time? A. Yes.

MR. ARMOUR: They merely appear to be copies of the things that are in the Department, or some of the things? A. Yes sir. 40

MR. ARMOUR: They allege they acted upon something handed out by one of the clerks in the Department.

MR. CLARK: That is what was handed over by this witness.

HIS LORDSHIP: When will you be ready to go on?

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High
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Justice.*No. 6.
Opening
for plaintiff
9th June,
1908.

MR. CLARK: I understood you, My Lord, to say you would put it on.
 HIS LORDSHIP: This case will go on immediately after Ross and Chandler.

June 9th, 1908.

Resumed June 9th, 1908.

MR. CLARK: My learned friend mentioned a motion which ought to have been mentioned yesterday. My learned friend put in the document in regard to the road allowance and it entails no additional evidence.

10 HIS LORDSHIP: What do you want?

MR. CLARK: I am asking that our pleading be amended by adding the road allowance.

HIS LORDSHIP: The pleading will be amended to meet the evidence as it comes out, unless there is some objection.

MR. ARMOUR: I may add that takes the pleadings from another action, and puts them in this action without providing for the costs in the other action.

HIS LORDSHIP: I will take care of that. I may consolidate the action later on when the evidence comes out. Go on.

20 MR. CLARK: One of our witnesses, we will have to call Honourable Mr. Cochrane, as to what was before him, the subpoena was in the Sheriff's hands.

HIS LORDSHIP: What do you want?

MR. CLARK: I ask to be allowed to give the rest of our evidence. He told the Sheriff he was not subject to a subpoena and we sent word that he was. What I would suggest is to take the other evidence. I would like, Your Lordship, to put in, it would be mere formal evidence as to what was before him at the time of that Order-in-Council.

HIS LORDSHIP: Mr. Cochrane cannot refuse a subpoena.

30 MR. ARMOUR: He will not be obliged to disclose what things he did for the benefit of the Council.

HIS LORDSHIP: Most likely I will not allow to be brought before me what was before His Majesty's advisers.

MR. CLARK: That is a question of fact, My Lord.

HIS LORDSHIP: Yes, he may be subpoenaed.

MR. CLARK: We may go on, My Lord, without closing our case.

HIS LORDSHIP: The Sheriff must have misunderstood the honourable gentleman. No one of His Majesty's advisers would say he was not subject to a subpoena.

40 MR. CLARK: Then I put in a certified copy of the Order-in-Council which is the basis of our claim, of the 30th October, 1905, making Coleman a special mining division.

We also have to prove it was in the "Gazette," I have the "Gazette" here and I would ask that there be simply a note that it was in the "Gazette" for the 4th of November, 1905.

HIS LORDSHIP: The Ontario Gazette may be marked.

In the
High
Court of
Justice.

No. 6.
Opening
for plaintiff
9th June,
1908,
—continued

Exhibit Number 18 Copy The Ontario Gazette, Saturday, November 4th, 1905.

MR. CLARK: Then, my learned friend, the evidence of Mr. Green was taken de bene esse.

HIS LORDSHIP: In what capacity was Mr. Green?

MR. CLARK: He was the licensee.

HIS LORDSHIP: He is a party?

MR. CLARK: No, My Lord.

HIS LORDSHIP: Put it in and have it marked.

Exhibit Number 19 examination de bene esse of William J. Green, and 10 exhibits marked upon said examination.

HIS LORDSHIP: If the exhibits are attached to the Commission they are part of the Commission.

MR. CLARK: Then, My Lord, I have a certified copy which proves itself under the Act, of the Caution filed under the Land Titles Act, filed on the 31st of December, 1906 dated 29th December, 1906.

HIS LORDSHIP: Whose caution?

MR. CLARK: Caution by the Florence Mining Company.

Exhibit Number 20 Caution by Florence Mining Company dated 29th December, 1906.

Then there are two letters, My Lord, that I ask to put in copies of, subject to Mr. Gibson sending down certified copies. One is a notice to the Department of the assignment from the Crown to the Florence Mining Company, and the other is the offer to perform the work upon the property.

MR. ARMOUR: The assignment ought to go in.

MR. CLARK: The assignment is in as an exhibit to Mr. Green's evidence.

Exhibit Number 21 Letter dated April 18th, 1906, and letter offering to do work 31st of January, 1907.

MR. CLARK: Then I will call the surveyor, Mr. Shaw.

No. 7.
Evidence of
John Henry
Shaw
Examined
by Mr.
Clark,

JOHN HENRY SHAW sworn, examined by Mr. Clark:

Q. You are a Provincial Land Surveyor, Mr. Shaw? A. Yes sir.

Q. And you made a survey of part of the bed of Cobalt Lake, part of Cobalt Lake? Have you got the plan of it here? A. Yes.

HIS LORDSHIP: Cobalt Lake is in the Township of Coleman, I understand? A. Yes sir, in the Township of Coleman.

MR. CLARK: Is that accurate? A. Yes.

Exhibit Number 22 Plan of part of Cobalt Lake.

Q. Were you present at the time of the staking of this claim? A. At the time of the survey, yes.

Q. I beg pardon? A. It was staked. I made the survey, put my post.

HIS LORDSHIP: What did you say? A. It was staked to my posts when I made the survey.

20

30

40

In the
High
Court of
Justice.

No. 7.
Evidence of
John Henry
Shaw.
Examined
by Mr.
Clark,
—continued

Q. What do you mean by the posts? A. The prospector's stake—he did not know—

HIS LORDSHIP: Tell me what was done? Were the posts there at all when you made the survey? A. There was a post at two points there in the survey.

Q. Then, you surveyed and they put the stakes according to your survey? A. Yes sir, that is what I mean.

HIS LORDSHIP: What two stakes were they? A. They were posts planted, My Lord, here at this point here, and this point here (designating on plan).

Q. Now let me see? A. At this point there, and this point here, in a former survey.

Q. Now wait, I am going to mark these at the points "A" and "B"? A. Yes.

Q. There were stakes there? A. Yes.

Q. What kind of stakes? A. This stake was planted by myself in the survey of J. S. 55.

Q. And "A"? A. There was a post planted there which I believe to have been planted in the survey of J. B. 1, commonly called the McKinley-20 Darragh property.

Q. Then, there was no staking done by anybody, except in making other surveys? A. I did not see any.

Q. Then did you do the staking? A. I planted these posts.

Q. At the point "C", "D"? A. Yes.

Q. Any more? A. That is all.

Q. Then, you planted stakes at "C" and "D"? A. Yes.

MR. CLARK: Q. J. S. 55 was made? A. It was made the summer before that.

Q. An old survey? A. An old survey.

30 CROSS-EXAMINED by Mr. Armour:

Q. What did J. S. 55 include, Mr. Shaw? A. The land under the water of part of Cobalt Lake.

Q. Did it run into the Cobalt Lake and include a portion of that? A. No, just the land under the water of Cobalt Lake.

HIS LORDSHIP: J. S. 55? A. J. S. 55. I am speaking from memory. I have not the plan by me, it may have included a portion on this side.

MR. ARMOUR: Q. When you say this side? A. On the north side.

Q. But it did include land under the water? A. Under the water, part of Cobalt Lake.

Q. What plan was that? A. I did that work under the instructions of Mr. Gorman of Ottawa.

Q. Did you know under what claim it was, whether Chambers or Bessey? A. I do not know any names. Mr. Gorman was the man I was working for.

HIS LORDSHIP: What Mr. Gorman? A. F. J. Gorman.

No. 7.
Evidence of
John Henry
Shaw.
Cross-ex-
amined by
by Mr.
Armour,

RECORD.

*In the
High
Court of
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Evidence of
John Henry
Shaw.
Cross-ex-
amined by
Mr.
Armour,
—continued

MR. HENDERSON: Mr. John Gorman was a partner in the McKinley-Darragh.

MR. CLARK: It is referred to by Mr. Gibson as the McKinley-Darragh, My Lord.

MR. ARMOUR: What is the acreage—what are the lines inclosing this claim of the Florence Mining Company, are these the red lines shown on the plan? A. No, the west boundary of J. S. 55, the original high water mark before the lowering of Cobalt Lake, thence along Cobalt Townsite to a post on a line produced west from this point, then following the high water mark of Cobalt Lake.

MR. ARMOUR: Really taking in all that which is shown pink on your plan? A. Yes.

Q. That is not rectangular is it? A. No.

Q. And what is the area? A. Nineteen and three-quarter acres.

Q. Would that include what is marked an island down there? A. Yes.

HIS LORDSHIP: That was made April 24th, 1906? A. The plan was made, the survey was made before that.

Q. When was the survey made? A. Sometime about the 1st of March.

MR. ARMOUR: Q. The 1st of March, 1906? A. 1906.

Q. Then that was not made for the purpose of recording? A. No, that was made for the purpose of recording here in the Parliament Buildings.

Q. For the purpose of the application to the Minister? A. Exactly, yes.

HIS LORDSHIP: Was the survey made for the purpose of applying to the Minister also? A. Yes, as I understood.

MR. ARMOUR: Q. Mr. Shaw, where were the posts planted, the stakes, the miners' stakes, did you see them planted at all? A. They were marked, my posts were marked.

Q. Were they put on the land? A. They were put on the land.

Q. Did you see any staking under the Mines Act? Stake Number 1, 30 stake Number 2, 3 and 4? A. No others but these.

Q. What? A. I did not see any others than these.

Q. You were surveying with surveyors' stakes? A. Yes.

Q. How high were they—six inches? A. They were higher than that, two or three feet any way.

Q. Square? A. Square and driven in.

HIS LORDSHIP: But they were not according to the Mines Act, not prospectors' stakes? A. No, not prospectors' stakes.

MR. ARMOUR: What I am asking, were there any prospectors' stakes there when you were there? A. I did not see any.

Q. Was the lake open water? A. No, it was ice.

Q. And you did not see any stakes? A. No.

Q. If they had been there, would your work have brought you to them?

A. It would have brought me to them, yes.

Q. Then how did you come to run these lines that are down in red, on the pink surface of your map, without any prospectors' stake? A. Well I did that according to the Mines Act, where it specifies it shall be run in un-

surveyed territory, this being unsurveyed territory in the Township of Cole-man.

RECORD.

*In the
High
Court of
Justice.*

Q. Wait, Mr. Shaw, you might survey a whole township. You must have had some instructions to confine yourself to the lake? A. I knew that this J. S. 55 was already applied for. I had no right to go into that. That confined me there.

Q. I want to know why you have your red lines just exactly where you have them—did you follow miners' stakes or take instructions? A. No, they were traverse lines necessary to make it up.

10 MR. ARMOUR: Q. That is the mining claim. I want to know what instructions were given you to survey that particular piece of land and water, and not half of it or a quarter of it with something else, why did you confine yourself just to the lake? A. On this side I confined myself by reason of the other having been recorded and surveyed, on the north side I made my lines correspond with lines of another claim which corresponded with the concession line of the township.

No. 7.
Evidence of
John Henry
Shaw
Cross-ex-
amined
by Mr.
Armour,
—continued

Q. Now you have the red lines on the rest of it? A. Yes.

Q. Is that the reason you did not go up there? A. The land was already taken, I had no right to it.

20 Q. Then, you left Cobalt Lake unsurveyed, according to you? A. Yes, unsurveyed territory.

Q. Why did you survey half of Cobalt Lake without the whole of it? A. I did not survey the whole of Cobalt Lake. These parts are not run.

Q. Tell me why you went through the lake? A. Because I had formerly surveyed it for another party.

Q. That was the only reason? A. And I had no right to do it.

Q. Was that the only reason? A. I would not do it, no matter how much I was instructed.

30 Q. No matter how much you were instructed you would not have done it? A. No.

Q. Were you instructed to keep outside the post? A. No.

HIS LORDSHIP: Your instructions were to take the bed of Cobalt Lake except what had been taken out? A. My clients, so far as they knew, it was not taken, but I told them that I knew, I had made the plan.

Q. What were you taking out of Cobalt Lake, all you could? A. No.

Q. What were you leaving out? A. A large part.

Q. Listen to me—what were you taking? A. The north part of it.

Q. That is left out because it was north of the concession line? A. It is not truly the first, called that.

40 Q. A projection between 401 and 404? A. Yes.

Q. Then, you took all you could of Cobalt Lake south of that line? A. Yes.

Q. Under what instructions—just taking all you could get? A. No. I was told to do it according to the Mines Act.

Q. Who did you get your instructions from? A. Well, it was Colonel Gordon, for Mr. Clark.

In the
High
Court of
Justice.

No. 7.
Evidence of
John Henry
Shaw
Cross-ex-
amined
by Mr.
Armour,
—continued

Q. What did he tell you to survey? A. Part of Cobalt Lake.
Q. What part—that is what I want to get at? A. They claimed the discovery was on that.

Q. And they told you to survey nineteen and three-quarter acres? A. No, they did not say the acreage.

Q. How much did they tell you to survey? A. To survey the southern portion which would take in their discovery.

Q. That is all you can tell us? A. And to be confined to the Mines Act.

Q. Confined by the Mines Act? A. Yes, and the Orders-in-Council relating thereto. 10

Q. So their instructions were to include their discovery and take in what the Mines Act allowed and the Orders-in-Council.

HIS LORDSHIP: Where were you told their discovery was? A. Well, approximately some place about the letter K.

HIS LORDSHIP: I will mark it O—is that about right? A. I think it is rather up this way.

MR. CLARK: Two hundred and fifty-three feet, you cannot calculate it with the eye.

HIS LORDSHIP: Between "O" and "B" somewhere? A. Yes, between 20 "O" and "B".

MR. ARMOUR: Mr. Shaw, do you know whether there were any posts on the ground at the time of your survey that would indicate to anyone going there how that portion which you have surveyed stood in relation to the surrounding claims? Were there any posts there at all? A. Yes, the J. S. 55 I had posted.

Q. Was there anything in regard to this particular survey, anything to indicate that that had been surveyed? A. No.

Q. And the only posts that you left were one at "A"? A. And "B".

Q. The only new posts you put down were at "B" and "D"? A. Yes, 30 "B" and "D".

Q. Nothing at the other end of the lake at all? A. I marked all the posts.

HIS LORDSHIP: What did you do? A. I marked the other posts "A" and "B" with new marks.

MR. ARMOUR: Q. But there was nothing at the south end of the lake? A. No.

Q. Either when you went there or left? A. I did not see it.

HIS LORDSHIP: What you say about the red lines is that they were traversed lines? A. Yes, that is necessary for the Department, to explain 40 how the Act was worked.

MR. ARMOUR: Q. Is there anything on that plan to enable another surveyor, taking the plan and going and finding the exact piece of land that has been surveyed? A. I see nothing to prevent his doing it.

Q. If the posts are gone away? A. If the descriptions of the adjoining property are correctly written he could do so.

RECORD.

*In the
High
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Justice.*No. 7.
Evidence of
John Henry
Shaw.
Cross-ex-
amined
by Mr.
Armour,
—continued

MR. ARMOUR: Q. How did it tie into the other properties, by your field notes or what? A. The post "A" was there, a fixed point. Then if "A" was gone, it would depend on the description of the adjoining point, for getting "A", if it was correct or not.

HIS LORDSHIP: You could get the line "A"- "B" from the adjoining properties? A. By taking an observation at "A" and running north astronomically you would get at "B".

HIS LORDSHIP: And then you would come up to the townsite? A. Yes.

MR. ARMOUR: Q. Providing you got the description? A. No, that depends on J. B.—the Darragh property and the Nipissing property.

HIS LORDSHIP: There is no difficulty in tying your property to the adjoining surveys? A. No sir, I do not see that there is.

HIS LORDSHIP: I do not see any myself.

Q. Where are your field notes? A. I had not time to get them. They are at Cobalt. I was at French River and had not time to get them and be here to-day.

HIS LORDSHIP: The field notes are procurable? A. Yes.

RE-EXAMINED by Mr. Clark.

Q. Another point about the date—do I understand you the 1st of 20 March? A. About the 1st.

Q. You are not positive as to the very day? A. No, it is in my diary.

HIS LORDSHIP: Now, you can get the exact date if it turns out to be material, in your diary? A. Yes.

HIS LORDSHIP: We can get that. Do not let us have any guessing.

MR. CLARK: The only other thing is in reference to the area there. Did you know at the time that the area that could be obtained was limited to twenty acres? A. Yes.

Q. And you observed that in making the survey? A. Yes, I observed that in so doing.

30 HIS LORDSHIP: I suppose you computed up the area after running this line to see if you had taken too much? A. Yes.

Q. And if you had found you had taken too much you would have cut that line short on the north? A. Yes.

HIS LORDSHIP: That is obvious.

Q. What was the Act that was in force when these transactions were going on?

MR. CLARK: The Revised Statutes, amended three times.

HIS LORDSHIP: It would not be the Act of 1906?

MR. CLARK: No, My Lord, it was before that. That did not come in 40 to force until after, it was after.

COLONEL JAMES ROBERTSON GORDON sworn, examined by Mr. Clark:

Q. Where do you live? A. Sudbury.

Q. What is your occupation briefly? A. An engineer.

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by Mr.
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HIS LORDSHIP: What kind of an engineer? A. I have worked on both lines, both civil engineering and mining, but for the last twenty years pretty much in mining. However, I am not a Graduate of any Technical School.

MR. CLARK: You are a graduate of a Practical School? A. Of a Practical School.

Q. Where have you studied? A. At the School of Science two years and various other places.

Q. So you have had a good deal of experience in the North country with reference to minerals there? A. Twenty odd years. 10

Q. When did you go to Cobalt Lake? A. First?

Q. Yes? A. I do not remember the year, it was shortly after the La-Rose was opened up.

Q. I want to get down to the matters in question, when were you to go there in reference to the work? A. About January, 1906.

Q. In January, 1906, what was the condition of the lake at that time? A. Covered with ice and snow.

Q. Covered with ice and snow. Then what did you do? A. I walked up and down the lake and examined the country some and put up a shanty on the ice and installed a diamond drill. 20

Q. I beg pardon? A. I put a shanty up on the ice and installed a diamond drill.

Q. Can you say on what part of the lake the drill was put? A. Very nearly.

Q. Will you show His Lordship pretty nearly where the drill was placed? A. This is the corner post. It was about two hundred feet—the drill went down at an angle of sixty degrees—it would be about two hundred and seventy feet, between two hundred and seventy and two hundred and eighty feet from this corner, and about one hundred and twenty feet from the shore line. I think that is the measurement. Their shore line 30 is not accurate.

HIS LORDSHIP: You had better get it in some method so I can fix it? A. I go by the discovery post. The discovery post was two hundred and fifty feet, with the angle given, I do not remember at this monent. They have that in a south-easterly direction.

Q. You saw the discovery post? A. Yes, I had the discovery post there, sir.

The Counsel asked me where the drill was—

HIS LORDSHIP: Do not go on talking. Let me do the talking for a little. Then you had a discovery post. Where did you put the discovery 40 post? A. As I supposed at the opening of the drill rod, the drill rod went down at an angle.

Q. That was about two hundred and seventy feet? A. No, two hundred and fifty.

Q. From point "D"? A. Yes sir.

Q. About two hundred and fifty feet? A. Two hundred and fifty-two feet I believe, sir.

Q. Now give me your angle? A. The angle was marked, but I have forgotten for the moment what that is.

Q. I mean the angle with it? A. The angle with this line, which is the line between 401 was given.

HIS LORDSHIP: Let us go on now, and then I will know where it was, have you got it anywhere?

MR. CLARK: Yes, it is two hundred and fifty-three feet, My Lord.

HIS LORDSHIP: I want the angle, two hundred and fifty-three feet—it may be anywhere in the circle.

10 MR. ARMOUR: South-westerly, the Statement of Claim says—that might mean anywhere?

MR. CLARK: It is just described—two hundred and fifty-three feet south-westerly.

HIS LORDSHIP: You cannot give me anything better than that? A. It was as near south-west as we could take it with the compass.

Q. How is the compass up there? A. There is a variation.

Q. Which way? A. To the west, I think, Mr. Shaw will say, of about eight or ten degrees, nine degrees.

Q. Did you allow for the variation? A. No.

20 Q. That is allowing for the difference? A. No.

Q. As nearly south-west magnetically as you could get it by the compass, and you say the compass there is what? A. I have taken observations; it varies, about eight degrees at the place I took it. Some places more.

HIS LORDSHIP: Varies how much, to the west? It is the iron causes the variation up there, considerably, or did you notice? (No answer.)

30 MR. CLARK: Now after you put up the shack and the diamond drill there, will you tell us what you did on the lake up to the time of putting the discovery post? A. The first thing we did was to put a casting pipe down, which we drove through water and mud until we struck ledge, struck the rock in the bottom of the lake. Then we put the diamond drill rod down in the casing pipe and began to bore, and we had some trouble, after boring for a short distance, getting fairly well started, I noticed from the water coming up in the casing pipe that we had had a changed formation, which I thought from the water was calcite. As calcite is an indication of mineral, I telegraphed—

HIS LORDSHIP: When you say mineral you mean valuable mineral? A. Yes, valuable mineral. It is associated with silver and cobalt in that camp. I wished to have, if there should be any mineral showing, I wished 40 to have somebody see it and I think I telegraphed to Mr. Clark.

Q. What was done, did anybody come? A. Mr. Green came up the next day.

— Q. Yes? A. And went up on to Haileybury. I do not remember how long he was gone. He came back and we went drilling in Mr. Green's presence, and eventually the drill got choked up, blocked, and we pulled the drill rod out and found the core which contained, found a core which contained cobalt and silver.

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Q. Yes, what was the object of Mr. Green going to Haileybury? A. I suppose he may have had more than one object. He wanted to arrange matters there and find out how things stood.

Q. Then this pulling the drill out was after Mr. Green came back from Haileybury? A. Yes, after Mr. Green came back from Haileybury.

HIS LORDSHIP: Was your rod vertical? A. No sir, it was at an angle of about sixty-five degrees.

Q. What do you mean by an angle of sixty-five? A. From the horizontal.

MR. CLARK: Q. Can you say whether at that time Mr. Green had his license with him? A. No, I do not remember.

Q. Then after finding this mineral with silver and cobalt, what did you do then? A. I personally—I think found Mr. Shaw who made the survey with our assistance, and the men's assistance, of the lake that evening and night.

Q. That is the survey? A. That is the survey Mr. Shaw made.

Q. Then what else did you do while the survey was being made? A. While the survey was being made we used the same posts, to stake the lake in the ordinary way and put in a discovery post.

Q. Now can you tell me—

HIS LORDSHIP: I do not think I understand that? A. Instead of doing it—

HIS LORDSHIP: Tell me what you actually did, and I will understand it? A. Well, Shaw put a post down here (designating on plan).

Q. At "D" "C"? A. They are the two points and we marked them as they should be marked on staking, not considering the question of it being surveyed at all.

Q. What you mean is, there were two stakes "A" and "B" there already? A. No, we used Mr. Shaw's posts for our stakes.

Q. He says he found two posts? A. That is on the McKinley-Darragh 30 post, that is J. B. but I put up the stakes at any rate, all these were posts that were marked on the four posts as staking posts.

HIS LORDSHIP: You see you are rambling—what about "A"? A. I cannot see "A".

Q. Come down to McKinley-Darragh, what did you do there? A. 1, 2, 3—this is Number 3 post.

Q. What did you do with "A"? A. We marked it as Number 3 post sir.

Q. Was that an old post? A. No, that was not an old post.

Q. This was not an old post? A. No sir, we put it in.

Q. Who are we? A. The men working for me.

Q. Did Mr. Shaw put in a post there too, or put in yours? A. I think he did, I am not sure about that.

Q. Well, what happened? A. Then we went up to the next point.

Q. "D"? A. The next point, that was 2 post. I have got mixed on this map. That is all.

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Q. There is "A"? A. We do not call that "A".

Q. I do not care what you marked that? A. That is Number 2 post.

Q. You marked this Number 2? A. We marked the next one Number

3.

Q. Was there an old post there? A. No, we put that post in.

Q. Who put it in? A. One of the men.

MR. ARMOUR: Q. And marked that 3? A. One of my men put it in.

HIS LORDSHIP: Q. Then? A. Then we chained along, and we came up to this point.

10 Q. "C"? A. And put in a post, marking it Number 4.

Q. That is "C". Well then, that is 2, 3, 4, what about one? A. The discovery post, we turned the angle off—

Q. Did you do anything at "D"? A. Number 1 post we marked Number 1 post, that Number 1.

Q. What do you mean by Number 1? A. Yes sir, put in a post.

MR. CLARK: They have to be marked, under the Act, My Lord.

HIS LORDSHIP: I want to know the facts. You put in a post at "D" and marked it 1? A. Also marked it the number of the license.

Q. Well? A. The date of discovery.

20 MR. ARMOUR: Q. What date? A. 7th March.

HIS LORDSHIP: 7th of March? A. 7th.

MR. ARMOUR: Q. 7th of March, what year? A. 7th of March, 1906.

Q. Was that on it? A. Yes, that was on it.

HIS LORDSHIP: The date, the number of license and what else? A. The distance.

Q. What did you put on it? A. The distance.

Q. You did not say the two hundred and fifty feet? A. Not two hundred and fifty, I think two hundred and fifty-two or two hundred and fifty-three feet to the discovery post.

30 MR. ARMOUR: Q. You just put two hundred and fifty-three? A. Yes. HIS LORDSHIP: What else? A. The direction.

Q. What direction? A. South-west—S.W.

Q. Is that all? A. No sir.

Q. Is that all you did? "D", is this post up here? A. I do not know what I have given you.

Q. Now you marked it one, gave the number of the license, 7th of March, 1906, two hundred and fifty-two or two hundred and fifty-three feet, you are not quite sure; and S.W. A. Yes, then the date, and the licensee's name, Mr. Green.

40 MR. ARMOUR: Q. What did you put on "Mr. Green"? A. "W. J." I think it is.

Q. We want to know what you put on—we know what his name is? A. I do not remember his name.

HIS LORDSHIP: Now is that all you got on it. Then what else did you do on the ground in your surveying? A. Then we put this discovery post, set it on the ice.

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HIS LORDSHIP: Two fifty-two or two fifty-three south-west magnetically from point "D"? A. From point "D".

Q. Well? A. We marked that also with the number of the license.

Q. Yes? A. The name of Mr. Green.

Q. Well? A. The distance from Number 1 post and the direction north-east.

HIS LORDSHIP: The direction north-east? A. Yes sir.

Q. Well? A. I think that was all.

HIS LORDSHIP: Anything else Mr. Clark?

MR. CLARK: I think we have gone over all the posts. Then, in reference to the position.

Q. Did you see, was there any other person else working at the same time as you were? A. There was no person at all working on the lake.

Q. Was there anything to indicate occupation? A. There were no signs of occupation whatever.

Q. Was there any sign of any work being done? A. None.

Q. Or having been done? A. No.

CROSS-EXAMINED by Mr. Armour:

Q. What actuated you in placing the shanty in the particular spot which you did? A. I examined the country pretty carefully and thought— 20

HIS LORDSHIP: Your own judgment or some information you received?

A. My own judgment.

MR. ARMOUR: Q. What marks did you find in the country to indicate that was a good place to begin drilling? A. Almost any other place might have done, but one or two other places, that would have done just as well.

Q. Just answer my question? A. I am a little deaf sir.

Q. What indication did you find to induce you to commence drilling in that particular spot? A. Just a general opinion.

HIS LORDSHIP: Based on what you saw? A. General contours of the ground, etc.

MR. ARMOUR: Q. Did you examine the bank? A. The bank was covered with snow. I did not examine the bank.

Q. What indication would show the general contour of the country?

A. It is all rough country, and it breaks up on this side of the lake, up on the Nipissing property, which might be veins, and we might cross cut them if they came down to the lake.

Q. So you attempted to cross cut one of them? A. Yes, various things.

Q. So it was on account of the conditions surrounding the lake which caused you to judge, which you thought you would cross cut with a drill?

A. I saw veins upon the shore, at least up on the hill, and I cross cut in the lake, hoping they should come down there.

Q. You had very good inducement they would cross about where you were? A. There were no indications on the shore.

Q. There were good indications somewhere that induced you as an en-

gineer to select that spot? A. It depends on what you mean by indications. There were no indications.

Q. I do not mean an indication of mineral or showing. I mean there were certain topographical appearances in the country which induced you to attempt to cross cut it? A. Several veins.

Q. And you did cross cut it? A. I did.

Q. I suppose you know as a man who had been up there a good deal, there were veins running or supposed to be running into the lake all around at different points? A. No, I do not suppose it is very generally supposed, 10 on the opposite side—

Q. Take on the east side? A. On the east side, yes.

Q. It was common knowledge? A. Nobody that I knew had that knowledge.

Q. There was a claim made? A. Several claims made.

Q. And that was common knowledge in the camp? A. I cannot say that.

Q. You knew it? A. No, I did not know it.

Q. You heard it? A. No, I was not acquainted in Cobalt at all, I had no connection at all with any people when I went up there.

20 Q. Was it not rumoured up there, there were veins running into the lake? A. I do not know that I ever heard the rumour.

Q. What tempted you to go up there, just simply from the position? A. It is one of the best positions in the country.

Q. What makes you say that? A. Because the Nipissing is on one side, and the LaRose on the north, and on the opposite side various properties.

Q. Now a person does not go with a diamond drill and put it blindly into the lake? A. That is what he does.

Q. He tries to cross cut a vein? A. Sometimes he does and sometimes not. If he gets a piece of property he puts in several holes.

30 Q. I want you to give me the date on which you got the calcite, that is the mineral bearing substance? A. I think it was the 5th or 6th.

Q. I want you to be particular. You have no diary? A. I have a diary, but I am not sure that it is there, I do not know that I have mentioned it.

Q. I do not want my learned friend to come back and fix another day afterwards. You had better fix it right the first time. While you are looking for that, perhaps you can tell me how long you were boring before you got to the calcite? A. Oh, but a short time, a day or two we were fixing, we did not do much drill work, we were working at it a number of days.

40 Q. Now tell me the date you found it? A. I have not the date that I made it, but I have the date of a telegram that Mr. Clark got, he came there on a telegraph to Clark. I did not keep the diary very well.

MR. ARMOUR: Q. It must have been the 5th he got the telegram? A. I cannot fix the date by the telegram, but I know it was the 5th I first saw it.

Q. It was the 5th you first saw the calcite? A. Yes, in the water.

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Q. That is the mineral bearing substance? A. It is associated with it.

Q. All the finds up there are found in calcite? A. No, if a man gets a calcite vein he thinks he has something under it.

Q. That is generally where they find the silver? A. Yes, of course some calcite veins have not silver.

Q. But if you have a calcite vein you expect to get silver? A. Hope for it.

Q. Was there any inspector there when you took the core out? A. None, except my men.

Q. You know what I mean by a Mining Inspector? A. There was none.

Q. When did you get a mining inspector to inspect? A. We never got one to inspect.

Q. You know of course, that the practice of the Mining Inspector is never to pass a claim which has been drilled unless they were present when the core came up? A. Quite right.

Q. And the reason for that? A. To verify the core.

Q. Because they cannot say otherwise that the core came out of that vein? A. Certainly.

Q. So you were never in a position to get the Inspector's report on that? A. No sir.

Q. You had no mining license yourself? A. Yes, I had a license.

Q. When was that? A. My mining license was only dated the 7th.

Q. When you went up there and set up your drill you had no license?

A. No.

Q. You took one out on the 7th? A. I took one out on the 7th.

Q. That was because you found the silver? A. No, I do not remember that.

Q. You had to have a license? A. I was green in the country.

Q. Never mind that, you had another man who was called Green. You took it out because you found the silver? A. I had to have it anyway, and I have kept it up ever since.

Q. Do not argue—why did you take out the miners' license on the 7th? A. I do not know, and I would not have known of it, I happened to find it.

Q. Why did you take it out? A. Because it is necessary, to do any mining work.

Q. Why didn't you take it out before you put your drill up? A. Because I neglected it.

Q. Was that the only reason? A. Yes, it wa not the ten dollars.

Q. How did you operate the diamond drill? A. By a gasoline engine.

Q. Now, you come to the staking, you know the requirements of the Mines Act? A. Yes, pretty well.

Q. Tell me which way your first post, post Number 1 was facing? A. Facing towards the post Number 2.

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Q. That would be south-west? A. That would be about south-west. RECORD.

Q. It was not facing about south? A. No.

Q. Then how was Number 2 facing? A. Number 2 was facing towards Number 3.

Q. That would be north? A. We run by the compassed line, yes, it would be about north.

Q. Then how did Number 3 face? A. Number 3 faced towards Number 4.

Q. And how did Number 4 face? A. Number 4 Number 1.

Q. Then, if you take in—

HIS LORDSHIP: What are you calling post Number 1.

MR. ARMOUR: This is 1, My Lord, 2, 3 and 4.

HIS LORDSHIP: You are calling "D" Number 1?

MR. ARMOUR: "D" is 1.

HIS LORDSHIP: "A" 2, "B" 3 and "C" 4.

MR. ARMOUR: Q. And if you take the claim within these four posts, you only get a sort of triangular piece of the lake? A. It cuts off, evidently a piece on the map.

Q. You did not put any post down on the south-easterly portion of the lake? A. No.

Q. And when you put in your claim, you claimed the whole of the portion colored pink on this plan? A. I cannot say, I do not know about that.

Q. How did you get these posts into the ground? A. You could not get them into the ground. It was covered with ice and snow.

Q. How did you get them on the lake? A. These were on the shore line, but the discovery post was put on the ice. That was put on the ice with stones piled around it.

Q. How could you make it stand up? A. You could chop a hole in the ice very easily.

Q. Did you? A. I do not know how it was put up.

Q. I would like you to give me some information. You are making a valuable claim, and it is acquired in a very easy way, in planting stakes in the ground. I want to know if you did that there or not? A. You can only have my opinion—I think we cut a hole in the ice.

Q. Did you superintend it? A. I superintended it.

Q. As an engineer you would like to see it done as well as you could?

A. Yes.

Q. And all you think is they cut a hole in the ice? A. I cannot swear to it.

Q. You cannot say how it was inserted? A. I do not remember.

Q. It was not put down to the bottom of the lake? A. No, just in the ice.

Q. And in the spring it went away? A. Of course.

Q. And all the other posts too? A. I do not know, the others ought not to have done, they had stones around them.

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Q. The others had stones around them. Not driven in the ground? A. They were on the shore line down to the lake.

Q. They were on the shore line? A. On the shore line, yes.

Q. And in the spring they all went away? A. I suppose so.

Q. They have never been seen since anyway? A. I have never looked for them.

Q. Did you put anything down to show the boundary lines of your claim? A. The only—nothing but the posts, the posts fixing the boundary.

HIS LORDSHIP: Did you do anything more than put in these posts? A. Nothing more than put in these posts.

MR. ARMOUR: Q. You made no monuments, to take the place of blazing in the woods? A. No.

HIS LORDSHIP: Is that country wooded there? A. Not there, it is utterly barren.

MR. ARMOUR: Q. Since the snow went away have you become familiar with the surface there? A. I have seen it.

Q. Don't you know now, can't you say now that the fact is that veins are run right down to the lakeshore, just opposite to where you drilled? A. If the vein that I struck goes on shore I do not think it has ever been exposed.

Q. There are other veins running down? A. There are veins going down. I do not know of another vein where the drill rod would catch it.

Q. In the neighborhood on that side of the lake? A. In that portion, but not opposite.

Q. How far from the shanty was the discovery post put—just tell us in feet? A. I cannot give it to you in feet without calculation. I would have to figure the length of the drill rod and the angle of inclination to give it to you.

Q. You need not give it exact?

HIS LORDSHIP: You can give us the depth to the rock? A. There was sixty feet, with an angle of sixty-five.

Q. You mean the lake was sixty feet deep? A. Yes sir.

HIS LORDSHIP: And we can easily get that ourselves.

MR. ARMOUR: Q. Was that sixty feet to the bottom of the drill, where the core came out? A. No, to the surface of the rock.

Q. And then how many feet did you go down through the rock?

A. Five or six feet.

Q. Or seventy feet from the surface of the water? A. Yes.

Q. And in what direction—north-easterly? A. Yes, north-easterly.

HIS LORDSHIP: That would be about a hundred and two feet?

A. From memory, sir.

MR. ARMOUR: Q. Mr. Gordon, Mr. Green says there was no snow on the shore when they were putting up the stakes? A. Well, he is mistaken.

Q. He is mistaken about that? A. Yes, the snow was deep.

Q. And you dug away the snow and put down your stakes and put stones around them? A. It was generally loose rock. The snow was up to your knees.

RE-EXAMINED by Mr. Clark:

Q. I want to just ask about this inspection. How were you to pass the inspection of this discovery? A. I expected to put another diamond drill down, and ask the Inspector to be present.

Q. And were you prepared to do that? A. Prepared to do that.

Q. Did you offer to do that yourself? A. No, I do not think I did. 10 I do not think it got to that stage.

Q. I want to ask you whether the calcite that you got before the 7th showed silver or not? A. Before discovery I did not see any.

Q. You did not see any? A. No, in fact I know it does not. //

HIS LORDSHIP: Let me understand that, before the 7th you saw calcite coming up which gave you the idea you would or might? A. Yes sir.

Q. And when was it that you actually found silver so as to know it was silver? A. It was in the core, well marked.

Q. When was that? A. That was on the 7th of March, the 7th of March, 1906.

20 MR. CLARK: Q. Was that before or after Mr. Green came? A. That was after Mr. Green came back from Haileybury.

Q. Did he bring back your certificate or how was it? A. I do not recollect ever seeing his certificate.

Q. Your certificate? A. I think it probable, I do not remember.

Q. You think he brought it out with him? A. I think likely he did, because it is the same date, that is the only reason I have for saying so.

Q. Then you told my learned friend about the posts facing, each post facing in the direction of the other. Can you tell me on which face the marks were placed? A. In the direction going from Number 1 around to 30 Number 4.

Q. I forgot to identify the piece of core that was put in. It is marked as an exhibit to Mr. Green's evidence. This is put in the envelope and marked.

HIS LORDSHIP: What do you say about that, Mr. Gordon? A. That is the core.

Exhibit Number 19 Diamond drill core marked as one of exhibits on Mr. Green's examination as Number 4.

MR. CLARK: Q. Did that core come from the drill hole in the lake? A. Yes.

40 HIS LORDSHIP: The next witness.

MR. CLARK: That is all, except Mr. Cochrane, My Lord, and of course there are some papers we have asked Mr. Gibson for.

HIS LORDSHIP: The case is closed, except the evidence of Mr. Cochrane and certain papers. When can you get Mr. Cochrane?

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MR. CLARK: I think I can get him, I should certainly get him served this afternoon probably.

MR. ARMOUR: I will advise the Minister he must obey the subpœna.

HIS LORDSHIP: He must obey the subpœna, and if there is any reason he must not give his evidence. There must have been some misunderstanding.

MR. ARMOUR: The only occasion when a Minister was examined was Mr. Gibson. It is usually the Executive—

HIS LORDSHIP: This seems to have been an act on the part of the Executive Council. Perhaps Mr. Cochrane is the only one that knows. I 10 will see when he comes. He may not give any kind of evidence, but he must come, and if he shall give a certain kind of evidence that is another thing. Nobody shall interfere with His Majesty's Ministers.

DEFENCE.

RECORD.

GEORGE THEW SMITH, sworn, examined by Mr. Henderson:

*In the
High
Court of
Justice.*

No. 9.

Evidence of
George
Trew
Smith,
Examined
by
Mr. Hen-
derson.

Q. You have an official position at Haileybury, have you not?

A. Yes sir.

Q. What is that position? A. At the present time as Mining Recorder; when I assumed the position I was known as Mining Inspector.

Q. What was your position in the month of March, 1906? A. Well, I am almost at a loss to answer—it was Mining Recorder, I think the title had been changed previous to that time.

10 Q. But at all events you were the man with whom mining claims had to be recorded in that district? A. Yes.

Q. And in the district in which Cobalt Lake is situated? A. In the Temiskaming mining district in which Cobalt Lake is situate.

Q. And did you know Colonel Gordon who gave evidence a few days ago at that time? A. Yes.

HIS LORDSHIP: The last witness? A. Yes, I knew him as that, as Colonel Gordon.

MR. HENDERSON: Had you known him in that district previous to March, 1906? A. Yes sir.

20 Q. Had dealings with him? A. Well, I cannot say that I positively had dealings with him. He had been frequently in my office. I was well acquainted with him.

Q. And you were familiar with the mining district generally? A. The Temiskaming District.

Q. Your office is at Haileybury? A. Yes sir.

Q. How far is that from the town of Cobalt? A. I should say four and one-half—between four and five miles.

30 Q. And the Town of Cobalt is situated immediately on the border of Cobalt Lake, marked "Town site" on the plan? A. The town proper is on the west side of the lake.

Q. And were you familiar with the conditions around the town of Cobalt at that time? A. Well, in a general way, yes.

Q. Up and down there? A. Not often.

Q. There were some—this is perhaps slightly leading—there were some well known mining claims around Cobalt Lake at that time? A. Yes sir.

Q. Was there any portion of the property surrounding Cobalt Lake which had not been recorded in your office as mining property? A. On the east side of the lake, I do not think there was.

40 Q. That is the side opposite from the town? A. Yes sir.

Q. And on the west side was there any? A. There may have been

RECORD.

*In the
High
Court of
Justice.*No. 9.
Examined
George
Thew
Smith,
Examined
by Mr.
Henderson,
—continued

some, I am not clear on that point. I do not think so, but there may have been some.

Q. Would it have been any appreciable amount? A. I do not think so.

Q. So that all around the lake was taken up? A. Practically it was, yes.

Q. And have you at any time, either before then or since, recorded any claims, any mining claims in the bed of Cobalt Lake? A. Previous to that time I had, sir.

Q. You had—what was that? A. An application filed by Mr. Bessey 10 in June, 1905, and an application filed in favor of Mr. Strathy, speaking from memory, in July, 1905.

Q. That is, these applications had been received by you? A. Yes, and recorded.

Q. Did they cover any portion of the lake that is now in question—you know the part? A. Yes sir.

Q. They did; what became of these applications? A. I sent them to the Bureau of Mines, Toronto, I think they are now in the office of Mr. Gibson, the Deputy Minister.

Q. These are the applications he spoke of yesterday? A. I suppose 20 so, I might say I have certificates, abstracts of those in my possession.

Q. I think we went into those yesterday. Now with the exception of these, have any claims at any time been recorded? Why have claims not been recorded there—I will put it this way, were you in a position in March, 1906, to receive a claim? A. Not to record a claim.

Q. We understand that Mr. Green presented a claim to you, or somebody, in his behalf, to be recorded? A. Yes sir.

Q. Why did you not record it? A. Because Cobalt Lake had been withdrawn by Order-in-Council in August, 1905.

Q. In August, 1905, and since that date, from August, 1905, on, had 30 you ever been asked to record a claim until this claim was presented to you? A. Not to my recollection, and I am pretty clear on the point.

Q. To what extent was the Order-in-Council promulgated in that district? A. Just as to that, the only evidence I have on it was—

HIS LORDSHIP: Is there any need going into all that?

MR. CLARK: It don't make any difference. We are bound, I expect.

MR. HENDERSON: Just one question.

HIS LORDSHIP: Let us get on.

WITNESS: To my knowledge, the only manner in which the public could arrive at a knowledge of it, was the fact it was posted up on the 40 walls of my office on or about the 18th day of August, 1905.

MR. HENDERSON: I agree with Mr. Clark, it is not important.

WITNESS: When I say posted up, I might say nailed up.

CROSS-EXAMINED by Mr. Clark:

Q. Do you remember the Johnson claim to part of Cobalt Lake? A. No sir.

No. 9.
Evidence of
George
Thew
Smith,
Cross-ex-
amined
by Mr.
Clark.

RECORD.

*In the
High
Court of
Justice.*

No. 9.
Evidence of
George
Thew
Smith,
Cross-ex-
amined by
by Mr.
Clark,
—continued

Q. You do not remember that? A. No sir, no recollection.

Q. Then the Order-in-Council was not posted up in your office at the time? A. That Mr. Green put in his application?

Q. Yes? A. No, it was in my office, but not posted up.

HIS LORDSHIP: Why was it not posted up? A. It was taken down, I moved into new premises on or about the 18th of November, 1905, it was taken down and then moved into my office, and I might say that until about a week ago I was positive that it had been re-posted, on my entry to the office.

10 Q. Yes? A. Since that time I am inclined to doubt it, because I find another Order-in-Council I might have confounded with it.

HIS LORDSHIP: Then your idea is you posted it from August to November? A. It may not have been, I think, I was under the impression it was, it was in my office.

MR. CLARK: The Bessey claim and the Strathy claim was the same one, it was so identified? A. They were different applications, but they were filed on the same property, one on behalf of Mr. Bessey and the other on behalf of Mr. Strathy.

20 HIS LORDSHIP: In the same interest you mean? A. Yes sir, practically.

MR. CLARK: Q. The Minister was under the impression that it was posted up at the time Mr. Green was there? A. I cannot answer for that.

HIS LORDSHIP: That is a bit far fetched.

MR. CLARK: No, that is the reason—

HIS LORDSHIP: Is it not rather far fetched to ask this gentleman what was the impression in another man's mind?

MR. CLARK: I should have asked him whether he heard him state it.

HIS LORDSHIP: That would not help you.

30 MR. CLARK: You told the Minister that you were under that misapprehension—it was posted up? A. I do not know that I told him, but I might have given him to understand it of course, if he says I did he might have.

MR. HENDERSON: That is subject to objection, My Lord.

MR. CLARK: He understood it was posted up? A. He might have. I cannot say for that.

Q. When you are speaking of the well known, you are speaking of the Nipissing, the LaRose and the McKinley-Darragh claims in that vicinity? A. Yes.

40 Q. And after the Order-in-Council of August 5th, 1905, which you say withdrew the lake, you refused after that to accept any more claims? A. I do not think as a matter of fact, Mr. Clark, any applications were tendered to me until this one of Mr. Green was tendered to me.

Q. You refused to record that? A. Yes, I refused to record that.

Q. Taking that the lake was withdrawn? A. Yes sir.

Q. So that that was the only objection you took at the time? A. That was the only objection.

RECORD.

*In the
High
Court of
Justice.**No. 9.
Evidence of
George
Thew
Smith,
Cross-ex-
amined
by Mr.
Clark,
—continued**No. 10.
Evidence of
Hon.
Francis
Cochrane,
Examined
by Mr.
Clark,*

Q. That you considered the lake withdrawn? A. Yes.

HIS LORDSHIP: Any more, Mr. Armour?

MR. ARMOUR: No, My Lord, we have no more witnesses.

HIS LORDSHIP: Reply.

MR. CLARK: That is everything, My Lord.

HIS LORDSHIP: We will adjourn to hear Mr. Cochrane. Whatever date you can get Mr. Cochrane, the Minister must be present.

MR. HENDERSON: What I would suggest was, if I should find Mr. Cochrane available, can we take him—

HIS LORDSHIP: At any time, if he prefers nine o'clock I will take it. 10

June 10th, 1908.

Court resumed 10.30 a.m.

HONOURABLE FRANCIS COCHRANE, sworn, examined by Mr. Clark:

Q. You are the Minister of Mines, Forests and Mines, Mr. Cochrane, and were, in 1906? A. Yes.

MR. CLARK: I can read it afterwards, My Lord, I have a copy of it here.

Q. You recollect a letter, the Clerk will show it to you written by— 20

HIS LORDSHIP: What is the Exhibit Number?

MR. CLARK: Exhibit Number 8, My Lord.

HIS LORDSHIP: What is the answer, Mr. Cochrane, do you remember it? A. I do not know as I have any particular memory. It is to my Deputy. I do not see all the letters that come to him.

MR. CLARK: Yes, he states that the Department is not prepared to consider Mr. Green's application? A. He does not state that I am not—he is advised.

Q. Read then, Exhibit Number 9 (Witness reads letter)? A. Yes.

Q. Mr. Gibson says there he writes this on your instructions? 30 A. Yes.

Q. And they were to return the affidavits that we submitted on behalf of Mr. Green? A. Yes.

Q. And you have never had these affidavits back since? A. Well, I have not personally, I do not know whether others have.

HIS LORDSHIP: Mr. Gibson told us they have not.

MR. CLARK: Q. Then at that time, did you act on the basis of Cobalt Lake being withdrawn from exploration?

MR. HENDERSON: That is leading, My Lord.

WITNESS: I refuse to answer it.

HIS LORDSHIP: I cannot prevent the question being asked. I will not ask a Minister of the Crown to state any reason for his official action. With that I have nothing to do. If the Minister desires to state it I will 40

do so, but I shall not compel him to do so. In matters of State it is for the Executive, for His Majesty's advisers to use their own judgment, and with that judgment neither the Judges nor anybody else has anything to do. That is for the electors afterwards. Mr. Cochrane may refuse if he desires.

WITNESS: I refuse to state that.

HIS LORDSHIP: I sustain the refusal.

MR. CLARK: Were you cognizant of the Order-in-Council of the 30th October, 1905?

10 HIS LORDSHIP: Show Mr. Cochrane the Order-in-Council.

MR. CLARK: That is the Order-in-Council of the 30th October, 1905?

A. What was your question with reference to this?

Q. I was asking you, at this time in March, 1906, were you cognizant of this Order-in-Council of the 30th October, 1905? A. I certainly was.

Q. And having regard to that, I ask if you considered Cobalt Lake as in fact open for exploration at that date?

MR. ARMOUR: I object to that. That is a question of interpretation.

HIS LORDSHIP: I do not think that is quite on the same basis. I cannot inquire except with the consent of the witness himself, into the motives 20 which influenced him in doing anything. As I said before, His Majesty's advisers are responsible to their own consciences, to His Majesty, and to the people, but not to anybody else. It is for the representative of His Majesty to say no, if he sees fit, or for the people at the next election to interfere if they see fit, but I think the Court has nothing to do with the knowledge, which is within their power. It is possible within one view that I may have something to say. It can do no harm for the Minister to state whether he knew of such and such a condition.

MR. ARMOUR: If Your Lordship will permit me I will put it a little more plainly. I have no objection to any question being asked as to what 30 material was before the Minister, but as to whether he considered the interpretation or anything of that kind, I say that is a question of law whether that was in force or not—

HIS LORDSHIP: That is for myself.

MR. ARMOUR: I have no objection to his stating whether this was before him or that before him.

HIS LORDSHIP: I think it is not a matter of objection to be taken by either side to the litigation, as my view is that as the matter was entirely in the mind of the witness himself, I do not think it is a matter which either Counsel should interfere. I will not prevent Mr. Clark from asking 40 any question that he sees fit. The Minister will make up his mind whether it is proper in his view of the public interest and his duty to His Majesty and the people, to judge whether he answer that question. If it be a question which in my view he ought to answer I will so direct, and I have no doubt the Minister will answer, but until that stage arises, I do not think that I shall interfere. You quite appreciate the position?

WITNESS: Yes.

RECORD.

*In the
High
Court of
Justice.*

No. 10.

Evidence of
Hon.
Francis
Cochrane,
Examined
by Mr.
Clark,
—continued

RECORD.

—
In the
High
Court of
Justice.
—

No. 10.
Evidence of
Hon.
Francis
Cochrane,
Examined
by Mr.
Clark,
—continued

MR. CLARK: Q. My question is, having regard to the Order-in-Council of the 30th of October, which is printed in the exhibit, did you in March, 1906, at the time of the letters, Exhibit Numbers 8 and 9, understand Cobalt Lake as in fact open for exploration.

HIS LORDSHIP: I do not think that is the proper way to put the question. You see that is a double question, and suggestive. You may ask a question: "Did you consider so-and-so," or "Did you have regard to so-and-so," the question is not intentionally so, but in fact mis-leading.

MR. CLARK: All I ask is, at that time did you regard Cobalt Lake open for exploration? A. I refuse to answer that.

Q. And I want to ask the same thing in regard to the date of your report to Council on the 22nd of November? A. I refuse to answer that.

Q. Then I ask you was it reported to you by the Mine Recorder or Inspector, Mr. Smith, that the Order-in-Council of the 14th of October, 1906, was posted up in his office when Mr. Green made his discovery? A. That I cannot answer here. It is a matter of fact. It is something I cannot remember. I do not carry these details in my head.

Q. As to that you do not remember? A. I cannot remember whether he reported it, or that is the time Mr. Green made a report.

Q. At any time? A. Yes, it was posted up there, he swore to it. 20

Q. At the time of Mr. Green's discovery? A. I do not say that. You said any time as to the Order-in-Council being posted up—that is what I have reference to.

Q. You see you do not, Mr. Cochrane, I am sure you will give me this information. You know it was stated that at the time of Mr. Green's discovery the Order-in-Council of 14th of August was posted up in Mr. Smith's office. I wanted to ask if at any time Mr. Smith gave you that information? A. If he did I do not remember it.

Q. You cannot recall whether he did or not? A. No.

HIS LORDSHIP: Would that appear of record anywhere? A. I think it would. 30

MR. CLARK: It is stated by the Premier in the House? A. It was stated in the House when I was not there. I was absent from the country at that time.

MR. CLARK: Q. At any rate that is your answer. You do not recollect.

HIS LORDSHIP: Of course if it was stated by the Premier in the House there is a strong presumption that is the fact, although it is not legally proved. The Premier is not going to misrepresent any facts.

MR. CLARK: And also by Mr. Foy in the House.

HIS LORDSHIP: Do you know that, Mr. Cochrane? A. I do not know that. I was absent at this time. 40

MR. CLARK: Q. You were absent at the time of the statements in the House? A. Yes.

Q. Do you recollect Mr. Smith producing the Order-in-Council of the 14th August, 1905, with the nail mark in as if he had taken them down from his office? A. I do not remember the day he produced them. He

produced them when the hearing was brought, when you and the other gentlemen were there.

RECORD.

*In the
High
Court of
Justice.*

No. 10.

Evidence of
Hon.
Francis
Cochrane,
Examined
by Mr.
Clark,
—continued

Q. As if he had taken them down from his office?

HIS LORDSHIP: Mr. Cochrane says it was reported to him by Mr. Smith that that notice or placard was up at some time, but Mr. Cochrane did not recollect when he was so told, or when it was it was alleged to have been—as I understand? A. Yes.

HIS LORDSHIP: I take it for granted when the matter was investigated that Mr. Smith would say, as he seemed to be under the impression until very lately indeed that the placard was posted? A. When I came back from England what he said was this, that it was posted in the old office, and this was posted there and afterwards taken down when the walls were oiled; it was hard wood walls.

HIS LORDSHIP: That is the impression Mr. Smith was under.

MR. CLARK: That is what I say, until recently.

Q. At any rate, throughout, you adhered to the position taken in these letters, Mr. Cochrane? A. In reference to the position, you mean to the refusing the application.

Q. Yes? A. Yes.

20 HIS LORDSHIP: The letters properly represent the position taken by your Department? A. Yes.

MR. CLARK: Q. I mean that continued? A. Yes.

Q. Excuse me a moment, you know about the deed, the Patent in question to the Cobalt Lake Company?

HIS LORDSHIP: Is that Patent in?

MR. CLARK: It is alleged in the defence, My Lord.

MR. ARMOUR: It is not put in.

MR. CLARK: I am asking Mr. Gibson for a copy of it.

30 MR. ARMOUR: This is only reply. I should think the case was closed.

HIS LORDSHIP: Oh no, the case was not closed.

MR. CLARK: There were certain papers to come from Mr. Gibson.

Q. I am simply asking was there any question of discovery on behalf of the Cobalt Lake Company before your Department at all? A. What do you mean by the Cobalt Lake Company?

Q. The Cobalt Lake Company to whom you issued the Patent for one million and eighty-five thousand dollars? A. It was not required.

Q. There was no question arising as to that? A. No.

Q. That was sold and issued to them simply in respect to the payment? A. Yes.

40 HIS LORDSHIP: What you mean is it was sold to them out and out and not given to them under the Mines Act as a discovery, is that right?

A. That is right.

HIS LORDSHIP: So it is quite immaterial whether the Cobalt people made a discovery or not? A. They were not required to. It was a piece of property of the town.

Q. And this is a Patent from the Crown? A. Yes.

RECORD.

In the
High
Court of
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No. 10.

Evidence of
Hon.
Francis
Cochrane,
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by Mr.
Clark.
—continuedNo. 11.
Closing
Discussion.

Q. Under the direction of the Responsible Minister? A. Yes, and by an Order-in-Council as well.

HIS LORDSHIP: We had better have that Patent if anything turns on it.

MR. CLARK: Yes, My Lord, there are some papers Mr. Gibson promised to get, and I am asking him to include this.

HIS LORDSHIP: Is there any more evidence in this case?

MR. CLARK: I put in a letter by Messrs. Pellatt & Pellatt, thinking it was from Mr. Pellatt himself. My learned friend said he would admit that on his behalf.

MR. ARMOUR: He was acting for a syndicate of gentlemen, My Lord.

MR. HENDERSON: It is merely an answer to a letter to Pellatt & Pellatt. There is no question of agency.

HIS LORDSHIP: What is the number of the exhibit?

MR. CLARK: Dated the 4th of January, 1907. It was put in by Mr. Gibson, Exhibit Number 15.

HIS LORDSHIP: Is there any more evidence to be given in this case? On behalf of what syndicate?

MR. OSLER: A syndicate purchased the property, and transferred it to the Cobalt Lake Company.

HIS LORDSHIP: I have taken that down. Pellatts' letter was on behalf of syndicate which bought the lake from whom?

MR. HENDERSON: From the Government of Ontario, My Lord, the defendant company had not yet been formed.

HIS LORDSHIP: And sold it to the defendant company. To whom was the Patent issued?

MR. HENDERSON: The Patent was issued to the defendant company.

HIS LORDSHIP: The letter asks that to be done? The Patent was issued by the Crown to the defendant company of the property, it was the property of the Crown. There is no obligation on the part of the Attorney General by way of *fi fa* to compel that Patent.

MR. HENDERSON: None.

HIS LORDSHIP: And I am asked to find that the Crown had no power to make that Patent.

MR. CLARK: Yes, My Lord.

HIS LORDSHIP: When do you want to argue it?

MR. CLARK: There are some papers with regard to that ruling, Mr. Gibson said he would send down.

MR. HENDERSON: My learned friend has copies of these.

MR. CLARK: Not of the instructions to open Cobalt Lake, which I think is very material.

HIS LORDSHIP: Can you have them by 2 o'clock this afternoon?

MR. CLARK: I asked Mr. Gibson to send them. That need not delay the argument.

HIS LORDSHIP: Will everybody be ready at two o'clock this afternoon to argue this? RECORD.

*In the
High
Court of
Justice.*

MR. HENDERSON: Yes, My Lord.

MR. CLARK: There is a large number of documents. I would suggest if it meets your view, to put in a written argument.

HIS LORDSHIP: If everybody desires it, well and good.

MR. OSLER: No, My Lord, I strongly object.

MR. ARMOUR: I object, My Lord, I have too many cases going on.

MR. HENDERSON: Would Your Lordship fix 2 o'clock as the argument?

10 HIS LORDSHIP: I will hear anything that any Counsel have to say at 2 o'clock, and if any Counsel wants to send in written argument I will take that. I will promise to hold it open.

No. 11.
Closing
Discussion.
—continued

Certified a Correct Transcript.

J. E. HENDERSON,
C.S.R.

Official Reporter H.C.J.

December 18th, 1908,

413 Manning Chambers,
Toronto.

In the High Court of Justice

BETWEEN :

THE FLORENCE MINING COMPANY, LIMITED,

PLAINTIFFS;

AND

THE COBALT LAKE MINING COMPANY, LIMITED,

DEFENDANTS.

This is the examination *de bene esse* of William James Green for use 10 at the trial of this action, taken under an order of the Master-in-Chambers; before Frank C. Cook, Commissioner at the Muskoka Sanatorium, in the Township of Muskoka, District of Muskoka; taken in shorthand by Robert Tyson, Chartered Stenographic Reporter, a shorthand writer approved of by the Commissioner, and duly sworn herein; the first day of May, 1907.

Counsel present:

RECORD.

*In the
High
Court of
Justice.*

No. 12.
Evidence of
W. J.
Green,
(*de bene
esse*)
Put in at
the trial as
Exhibit 19.
Examined
by Mr.
Bradford,

MR. S. H. BRADFORD, for the plaintiffs.

MR. BRITTON OSLER, for the defendants.

WILLIAM JAMES GREEN sworn, examined by Mr. Bradford: 20

1. Mr. Green, you are at present in the Muskoka Sanatorium on account of your health? A. I am.
2. Before coming here what was your occupation? A. I practiced law in Toronto for some years.
3. You are a barrister and solicitor? A. Yes.
4. Had you any experience in mining law? A. I had.
5. To what extent, speaking generally? A. I was in British Columbia in parts of the years 1896, 1897, 1898 and 1899, I practiced law in British Columbia.

RECORD.

*In the
High
Court of
Justice.*

No. 12.

Evidence of
W. J.
Green,
(de bene
esse)
Examined
by Mr.
Bradford,
—continued

6. Q. In so practicing you had a good deal of experience in mining law? A. Yes, I had.

7. Q. Whom did you first see in reference to exploring or prospecting on Cobalt Lake? A. Mr. J. M. Clark.

8. Q. Of Clark McPherson & Co.? A. Of Clark McPherson & Co.

9. Q. And what was in general contemplated that time?

MR. OSLER: When?

10. MR. BRADFORD: Q. When you first saw Mr. Clark, about when was that? A. In January of 1906.

10 11. Q. What was contemplated at that time? A. Forming a syndicate to prospect at Cobalt.

12. Q. Did you see anybody else about that time in reference to it? A. I did.

13. Q. Whom did you see? A. Major J. R. Gordon.

14. Q. Then what was decided on? A. It was decided to prospect for mineral on Cobalt Lake.

16. Q. Was anything said about the right to go on the lake at that time? A. There was discussion about the chances of finding mineral on Cobalt Lake, and Gordon had been introduced to me by Clark, and Gordon said 20 that he was certain that he could find a vein of mineral in the lake.

17. Q. Then where was Gordon located at that time, as far as you know? A. At Cobalt.

18. Q. Then what did you next do? A. I went up to the Parliament Buildings, to the Department of Bureau of Mines, and enquired for information relating to Cobalt district. I saw one of the clerks there in the office and was given several pamphlets. One or two were mining reports; another was their rules and regulations.

19. Q. Yes? A. I told the clerk, a young lady in the office, that I wanted 30 all the information they could give me relating to the Cobalt district; and she told me—and handed me these pamphlets—that everything was contained there except a map of what claims or sections were open for location, but that I would find that probably by going to the Recorder's office at Haileybury, where they kept marked up to date showing what claims were open for prospectors and what had been applied for.

20. Q. In what particular office was it that you made the enquiry? A. At the Bureau of Mines, Mr. Gibson's office.

21. Q. Was it Mr. Gibson himself that you saw? A. No; it was Miss Moffatt.

22. Q. Do you recognize that pamphlet I show you? A. I do.

40 23. Q. This is Regulations for Mining Divisions, Exhibit 1. About what time was it when you went to the Parliament Buildings; about what date? A. In the fore part of January.

Regulations marked Exhibit 1.

24. Q. Then what did you next do? A. I went to Haileybury.

25. Q. What then? A. I went to the office of the Mining Recorder.

26. MR. OSLER: Q. Name? A. Mr. Smith is the Recorder's name.

RECORD.

In the
High
Court of
Justice.

No. 12.
Evidence of
W. J.
Green,
(de bene
esse)
Examined
by Mr.
Bradford,
—continued

27. Q. At Haileybury? A. At Haileybury.

28. Q. What took place there? A. I went to the office and asked for a map showing what claims were opened for location pursuant to instructions I had received from the Department of Mines in Toronto, and was handed a map of claims showing sections marked.

29. Q. Do you recognize this map I show you? A. I do. That is the map which I procured at that office.

Map marked Exhibit 2.

30. Q. Looking at this map Exhibit 2 what do the blue pencil marks indicate? A. The marks indicate claims applied for.

31. Q. In what condition was this map when you got it with reference to what it is now? A. I don't understand.

32. Q. Were these marks on there at that time? A. That map is exactly as it was when I got it.

33. Q. How did you get the information that the "A's" indicated "applied for?" A. I was told that in the office.

34. Q. By whom? A. By the young lady in charge.

35. Q. About what time was that when you were at Haileybury? A. About the 1st of February.

36. Q. Then from the regulations and information obtained at the Parliament Buildings, and that map that you got at Haileybury did you come to any conclusion as to whether Cobalt Lake was open for exploration? A. I did.

37. Q. To what conclusion did you come? A. I came to the conclusion that Cobalt Lake was open for exploration.

38. Q. On what did you base that conclusion? A. In the first place Major Gordon stated that it was open for exploration.

MR. OSLER: I don't think what Major Gordon said has anything to do with Mr. Green, unless you can show that Major Gordon had any authority for his statement. I think all you can ask him is "What was your conclusion from your enquiries there?"

39. MR. BRADFORD: Q. Was there anything particular in the regulations and the map you got that led you to conclude that Cobalt Lake was open? A. Well—

40. Q. Do you understand what I mean? A. Not quite.

41. Q. You have already told me that the "A" marked on the map indicated what? A. Claims applied for.

42. Q. And was Cobalt Lake as shown on that map handed to you, marked as applied for? A. No, it was not.

43. Q. Looking at page 30 of the book of Regulations, Exhibit 1, did you base any conclusion on the order-in-council of the 30th of October as to whether Cobalt Lake was open? A. I read this booklet through very carefully, and there was nothing here to indicate that it was not open.

44. Q. Did you then know in what township Cobalt Lake was situated? A. I did.

45. Q. In what township was it situated? A. In Coleman township.

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46. Q. From the regulations did you form any conclusion as to whether Coleman township was open or not? A. I understood that all Coleman township was open except what had been applied for, leased, or patented.

47. Q. And understood that how? A. I understood that from the map and regulations.

48. Q. Did you get any information or see anything, either at the Parliament Buildings or at Haileybury, which led you to conclude that Cobalt Lake was not open? A. No, I saw nothing.

49. Q. Did you have any knowledge at that time that Cobalt Lake was 10 not open? A. I had no knowledge that it was not open.

50. Q. Then what was done next? A. Do you mean with reference to forming the syndicate?

51. Q. With reference to exploring Cobalt Lake? A. To the practical work?

52. Q. Yes? A. A diamond drill was purchased, together with an engine to run it, and the necessary equipment. A house was erected on the ice on Cobalt Lake. The machinery was started under direction of Major Gordon, and after working there some weeks a discovery was made.

53. Q. Were you at that time the holder of a miner's license? A. At 20 what time?

54. Q. The time of making the discovery? A. I was.

55. MR. OSLER: Q. What date was the discovery? A. March 7th.

56. MR. BRADFORD: Q. Is that your license? A. That is.

License marked Exhibit 3.

57. Q. Did you personally see any of the operations that were carried on in the lake? A. I did.

58. Q. Over about what time did they extend? A. About four weeks.

59. Q. Was there anything secret about the way these operations were carried on in the lake? A. Nothing whatever.

60. Q. Was any objection taken by any person to your carrying on 30 these operations? A. No objection.

61. Q. Then coming to the date of the discovery, what date was that, do you say? A. March the 7th.

62. Q. Who were present, as far as you recollect, when the discovery was made? A. Major Gordon, the workmen engaged on the work, and myself.

63. Q. Do you know the names of the workmen? A. I did—if I can remember them now.

64. Q. I have the names. Mr. Osler, have you any objection to my stating them?

MR. OSLER: Not the slightest.

65. MR. BRADFORD: Q. Here are the names in the affidavit; A. Henry Prevost, Ormond Picard, James Sykes, Z. R. LePage.

66. Q. Do you remember what time of the day the discovery was on March the 7th? A. I think about four o'clock in the afternoon.

67. Q. Do you recognize the contents of that bottle, Exhibit 4? A. I

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do. These are taken from cuttings from the bore hole of the drill. They were taken out in my presence.

Bottle marked Exhibit 4.

68. Q. And you recognize that now as the same as the cuttings taken out at the time the discovery was made? A. I do. That exhibit is marked in my handwriting.

69. Q. To whom did you give possession of that, Exhibit 4? A. Mr. J. M. Clark.

70. Q. What position did he occupy with you? A. He was solicitor.

71. Q. He was your solicitor? A. Yes.

72. Q. What was done in consequence of the discovery? A. I went to Haileybury, to the office of the Mining Recorder on the morning of the 8th of March.

73. Q. What was done after the discovery? A. The claim was staked out that same evening, and a surveyor was employed to assist us in the staking, and measurements were made in order to put in a proper description, and all precautions were taken to have it conform to the regulations; and a description was drawn from the surveyor's notes, and an affidavit of claim was prepared or drafted; it was completed in the Mining Recorder's office the next day.

74. Q. What about staking? A. There was a discovery post placed on the ice at a point as nearly as we could judge immediately above the place in the rock where the mineral was found. Major Gordon made the calculations necessary to determine the exact spot perpendicularly.

75. Q. Let us go back a moment to the cuttings. From where were these cuttings taken? A. They were taken from the hole, the drill hole.

76. Q. And the drill was brought up from where? A. From the rock below. The process in machinery of that sort is that a jet of water is injected into the barrel of the drill, and that strikes the hole in which the drill is working, and forces up, on a pressure of something like a hundred and twenty pounds forces up the cuttings to the surface, and these cuttings are caught in a pan from this hole as they come up.

77. Q. Is that what happened here? A. That is what happened here.

78. Q. You were telling us where the discovery post was placed? A. Yes. Then a post was placed on the shore, I think 253 feet from the discovery post; I should perhaps not say on the shore; it was placed on the ice immediately adjoining the shore. Then the other posts in conformity with the regulations were placed at the other corners and were marked in accordance with the regulations laid down for that purpose, and everything was done to perfect the legal staking.

79. Q. Who was present when the staking was done, as far as you remember? A. Major Gordon, Mr. J. M. Clark, the surveyor—I think his name is Hunt! I may be mistaken in the surveyor's name, but I think it was Hunt all these men whom I have mentioned as workmen on the premises, and myself.

80. Q. And were you present throughout the whole time the staking was being done? A. I was.

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81. Q. What became of the surveyor's field notes, do you know? A. I RECORD. I presume he has them.

82. Q. Do you know whether he has or not? A. I do not. I suppose all surveyors keep their notes.

83. Q. This staking took place on what day? A. On the 7th of March.

84. Q. What was done after that? A. Next morning, that is, on the morning of the 8th of March, Mr. Clark and I went to Haileybury.

85. Q. Give me the order of events pretty much what happened there, will you? A. Mr. Clark asked Mr. Smith the Recorder for forms on which 10 to prepare a claim for the purpose of making the record. Mr. Smith furnished the forms, and the forms were prepared by Mr. Clark and myself. The form there is in my hand-writing. The description was furnished by the surveyor to Mr. Clark. On completing these forms and upon Mr. Smith administering the necessary affidavits including, I think, a description of the property or sketch, Mr. Clark tendered the applications to the Recorder; and Mr. Smith upon looking at it said, "I can not take records of claims on Cobalt Lake." Mr. Clark asked him why. He said that he had instructions from the Department not to do so. Mr. Clark said that instructions from the Department were of no use, that he must record the claim.

20 MR. OSLER: I don't know just how far all this is evidence against us. There is no foundation for it.

MR. BRADFORD: I am going to ask to have this taken anyway.

MR. OSLER: I suppose Mr. Cooke will let it be taken subject to the objection.

THE COMMISSIONER: Subject to the objection. I would not take the responsibility of ruling anything out that looks at all relevant.

MR. OSLER: I merely wish to note the objection to the evidence of this witness as to conversation that took place between Mr. Clark and the Recorder.

30 86. MR. BRADFORD: Q. Go on, Mr. Green? A. Discussion took place between Mr. Clark and Mr. Smith, and Mr. Smith was asked by Mr. Clark to produce what instructions he had. He could not find any. Mr. Clark told him that any mere instructions which he might receive would not be any bar to recording a claim, that nothing short of an order in council would be of any avail. Mr. Smith said there might have been an order in council, and picked up one of these little pamphlets and looked through it to see if there was not some such order in council. Not finding any, he seemed to be rather non-plussed, and said that he could not understand it, but there might have been an order in council as he had had some papers 40 pasted up in the old office he had occupied but which were not taken down when the new office was erected because they were pasted tightly to the wall and it would have torn them all to pieces to take them down, and there might have been an order in council there. In any case he showed quite clearly that he did not know definitely of any order in council.

87. Q. Was there any order in council there that day that you could see? A. There was no order in council there. Mr. Clark and I assisted

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him in the search; we looked at the wall where he turned to see if there was something, and there was nothing there.

88. Q. Was there any order in council in that office at any time when you were there that you saw? A. Never. I might say that Mr. Smith said that we could tender the claim to the office in Toronto, and that he would write them about it the same day; and I think we left him the claim in the meantime, but I am not positive as to that. Mr. Clark would probably remember it better, because he had the copies and did the tendering.

89. Q. Do you recognize Exhibit 5 as the claim that was tendered to Mr. Smith at Haileybury? A. Yes. I think these were made out in duplicate.

90. Q. Then having failed to get the matter recorded at Haileybury, what more was done, if anything, to get the claim recorded? A. Mr. Clark and I returned to Toronto and on my instructions Mr. Clark went to the Parliament Buildings to tender the claim; and he reported to me upon returning that there had been an order-in-council passed which he had learned of for the first time up there at the Parliament Buildings, and that the Department refused to accept the claim.

91. Q. Was there any offer made on your part to prove these facts to the Government? A. There was.

92. Q. With what action on the part of the Government? A. That no opportunity was given us to prove these facts.

MR. OSLER: You have not fixed the date of that.

MR. BRADFORD: I was going to ask you to assist me in that.

93. Q. About what time was it when the application to record was made at Toronto? A. That was about the 9th of March, immediately on returning from Cobalt or Haileybury.

94. Q. Do you remember about when it was that you asked the Government to give you an opportunity to prove these facts? A. I cannot remember exactly.

95. Can you tell me near the time? A. There was correspondence. If you have that I can refresh my memory.

96. (Reads letter of March 13th, written by solicitors to the Minister of Mines) A. I remember that letter being written. The correspondence was all gone over by me before being sent, and I kept in very close touch with the whole matter at that time, and a great deal of effort was put forth to get the Government to give a fair hearing of the whole matter on its merits; but we never succeeded in getting a fair hearing.

MR. OSLER: That is all subject to the same objection.

97. MR. BRADFORD: Q. Was any offer made to prove these facts on oath? A. There was.

98. Q. About when? A. There is another letter here, written later on (reads from letter). What do you say about what date that offer was? A. About the 23rd of June.

99. Q. Was any offer made subsequently that you know of? A. There was.

100. Q. To prove this under oath? A. There was.

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101. Q. Do you remember about when that was? A. There was an offer made at an interview which I and my counsel had with the Government.

102. Q. What member of the Government? A. With the whole cabinet.

103. Q. Do you remember about when that was? A. Have you the date?

104. Q. That would be about October, I think? A. No.

105. Q. Was it later than that? A. That was in November.

106. Q. What was the result of that offer on your part or on the part of the Company? A. I attended before the cabinet by appointment, together with my counsel Mr. C. H. Ritchie, K.C., and others, and made a statement on the facts to the cabinet. I think all the members of the cabinet except possibly one or two were there. In addition to the facts of the case, Mr. Ritchie stated to the Government that it was his opinion that Cobalt Lake was open for exploration at the time the discovery was made and was willing to stake his reputation on the matter. Mr. Smith the Mining Recorder was present at that meeting; and Mr. Smith said he would like to ask me a few questions. The Government would not permit that.

20 I offered there to be examined under oath there or at any time they wished for the purpose of proving exactly what we had done; and that was refused, Mr. Whitney saying he had no power to order anyone to submit themselves to examination, but we did not hear Mr. Smith's statement of the facts as he gave them to the Government. It was, you might say, an ex parte hearing, and we had no opportunity of answering anything he had to say whereas he was present and heard our statement of facts. So that we never had a fair presentation of the case. We always felt that if we had had that the Government would have—

MR. OSLER: All this is very irrelevant, because your claim is based on 30 the facts that you state.

MR. BRADFORD: I am not going to ask anything more about it.

MR. OSLER: I shall object at the trial to these answers, as I have already. My objection covers all the evidence from the time of the offering to record the staking, because I say it has nothing to do with this action.

THE COMMISSIONER instructs Mr. Osler's objection to be noted.

107. MR. BRADFORD: Q. I want to ask you, Mr. Green, as to the difficulty of making such a discovery as that made by you? A. I should say that there was a great deal of difficulty.

108. Q. In what way? A. We were located on the ice, two hundred and 40 fifty feet from the shore. The vein was apparently not visible from the shore, and that was Major Gordon's opinion. Major Gordon had undoubtedly some knowledge on which he based his calculations as to where to strike that vein. I don't know exactly what those calculations were, but the drill had to be put down in a depth of thirty or forty feet of water and I understood there was twenty or twenty-five feet of soft mud under that, at an angle in which the pipe would get bent as it went down, and I would

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say it was a matter of some difficulty to get a drill to run at that angle under these conditions. Moreover, the scientific knowledge necessary to find that vein seemed necessarily great.

109. Q. Do you know whether or not the vein as found in the lake was a direct continuation of a vein directly opposite on the shore? A. Major Gordon said not.

110. Q. Do you know that? A. Of my own knowledge I can not say.

111. At any rate it involved the expenditure of a good deal of time and money? A. It did.

112. Q. Did you pay any money to the Government for a patent of 10 that land? A. I did.

113. Q. Do you know how much? A. I think seventy dollars.

114. Q. Do you recognize this as the receipt? A. I do.

Receipt marked Exhibit 6.

115. Q. Did you take any steps to notify the Government that you were willing to perform the working conditions? A. I did.

116. Q. What steps did you take? A. A letter was written to them to that effect.

117. Q. About when, do you know? A. I don't remember the exact date. 20

118. Q. And you always have been willing to do that? A. I have.

119. Q. Up till the time you made the assignment? A. Yes.

120. Q. You assigned your claim to the Florence Mining Company? A. I did.

121. Q. Do you remember about what time it was?

MR. OSLER: April.

WITNESS: The 11th day of April, 1906.

122. MR. BRADFORD: Q. You recognize this, Exhibit 7, as the transfer? A. I do. 30

Transfer marked Exhibit 7.

123. Q. Transfer or assignment from Mr. Green to the Florence Mining Company of this mining claim. Was any notice given to the Department of that assignment? A. There was.

124. Q. On the 18th of April—see if this brief will help you to fix the time— A. There was a letter sent by me to the Inspector of the Temiscaming Mining Division at Haileybury on the 18th of April; and also one of the same date to the Honorable the Minister of Lands and Mines, notifying of my transfer to the Florence Mining Company of the mining location.

125. Q. Do you recognize this agreement dated the 11th of April, 40 1906? A. Yes. This is an agreement between me and the Florence Mining Company of that date.

Agreement marked Exhibit 8.

A piece of core made by a diamond drill is put in, Exhibit 9.

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126. Q. You formed a syndicate for the specific purpose of prospecting Cobalt Lake? A. Yes.

127. Q. Of which Major Gordon and a number of other men were members? A. Yes.

128. Q. Including yourself? A. Yes.

129. Q. The other men were J. M. Smith, Controller Toronto Street Railway; A. L. Eastmure, of Eastmure & Lightbourn; F. G. Lightbourn, of the same firm; J. H. Hvland, Manager of the Standard Bank; G. W. Irwin, Customs Broker; H. E. Strathy; A. D. Crooks, Dr. Mackenzie, Dr. Macpherson, Professor Bain, Major Gordon? A. Yes and others.

130. Q. With that object in view you went to the Parliament Buildings? A. Yes.

131. Q. Major Gordon had given you your information on Cobalt Lake? A. Yes.

132. Q. And as you said, you went to the Parliament Buildings to generally post yourself? A. Yes.

133. Q. Because you intended to go after other claims as well? A. Yes, and to generally post myself on the conditions. We were going to prospect Cobalt Lake; I wanted to know exactly how to stake a claim and what to do and all about it.

134. Q. When you went to the Parliament Buildings you did not see the Minister or his deputy? A. No.

135. Q. You saw a clerk in the office, a Miss Moffatt? A. Yes. I did not think it was necessary to see anybody who was appointed to give out the information.

136. Q. You did not make any enquiry at that time as to whether or not Cobalt Lake was open? A. No.

137. Q. You did not make any special enquiry about Cobalt Lake? A. No.

138. Q. You simply asked for the literature they had? A. Yes.

139. Q. And all information? A. Yes.

140. Q. About the township of Coleman? A. Yes.

141. Q. And you made no enquiry about orders in council? A. No.

142. Q. Have you any mark in Exhibit 1 to identify it as being the one you received at the time? A. All the underlining is mine.

143. Q. Was that all underlined at the time? A. Yes; it was underlined when I read it, shortly after getting it.

144. Q. What made you underline the order in council of the 30th October? A. My practice—

145. Q. Not your practice, but why did you underline that? Don't you think you underlined that at a later date? A. No, it was all underlined at the time. When I first get anything of that kind I always underline it; I get it to memory better then.

146. Q. Then you went to Haileybury and saw a person in the Records office? A. Yes.

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147. Q. You made no special enquiries there about Cobalt Lake? A. No.

148. Q. You simply asked for a map of the township of Coleman? A. For a map of the township of Coleman, showing what claims were open or applied for.

149. Q. You asked specially about the applications for claims? A. I asked for a map, as I had been told in Toronto that I would get a map showing the claims that were applied for.

150. Q. Do you remember the words you used to this person at Haileybury? A. Not exactly.

151. Q. I suppose they handed you out just an office map from the bundle of maps? A. This young lady told me that they made up these maps fresh every two or three days and handed them out, and there was every reason why I should believe that everything there represented was correct.

152. Q. Then you understood that these maps were made up every two or three days? A. Yes.

153. Q. Did you enquire then whether any change had been made since that map had been made up? A. I remember one thing I said to her, I said, "Is this up to date," and she said, "Yes." I had in my mind the possibility of a discovery between the time that Gordon understood it was open and the time that I applied, and I verified it in that way.

154. Q. Did you ask her to make certain about it? A. About which?

155. Q. About its being up to date, there being no applications in since it was— A. I merely asked the question, "Is this up to date?" And she said, "Yes."

156. Q. And she told you a minute before that it was made up every two or three days? A. Yes.

157. Q. You did not direct her attention to Cobalt Lake at all? A. No.

158. Q. Nor did you mention any special place where you were going to prospect? A. No.

159. Q. Then you obtained your license at the same time, Exhibit 3? A. At the time I was there?

160. Q. Yes? A. No; that was obtained on the morning of the 7th March.

161. Q. What date was it that you were there? A. The first time?

162. Q. Yes? A. About the 1st of February.

163. Q. And you started prospecting on that date? A. Yes.

164. Q. What were your first operations; to work the diamond drill? A. To work the drill, with a small house over it, similar to the place we are in now.

165. Q. Then Major Gordon selected the place where the diamond drill was to be put down? A. He did.

166. Q. He was employed by the syndicate? A. He was.

167. Q. And you don't know from what observations he based his choice of position? A. I do not.

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168. Q. The drill was put there for the purpose of prospecting Cobalt Lake? A. It was.

169. Q. As you knew? A. Yes.

170. Q. And you proceeded with that until the 7th of March? A. Yes.

171. Q. Working day and night, or just day? A. There was no work done there at night while I was there.

172. Q. And on the 7th of March you struck through a vein of calcite, bearing silver? A. Yes.

173. Q. The core was brought up by water in the usual way? A. Yes; 10 that is, the cuttings.

174. Q. The core of the diamond drill? A. The core was brought up in the barrel, as it usually is, unless it grinds up, when the water forces it out in the form of cuttings. There was a piece of core came up in the barrel, and the cuttings as well.

175. Q. Mr. Clark just happened to be at Cobalt when the discovery was made? A. No, he came up there; we expected that about that time we would have something, from the appearance of things, and we sent for him.

176. Q. What appearance led you to suppose that? A. Well, the character of the rock. 20

177. Q. You had only been in the rock how many days? A. I can't say that exactly now.

178. Q. A very short time? A. It was Gordon's opinion that we were very close to a discovery, and we wired to Clark to come up.

179. Q. As soon as the cuttings were brought to the surface and you knew you had struck silver, you proceeded to survey and stake a claim? A. Yes.

180. Q. That same day? A. Yes.

181. Q. You drove a discovery post, you say, on the ice? A. Yes.

30 182. Q. A wooden post? A. A wooden post.

183. Q. About four feet long? A. Yes.

184. Q. How was it marked? A. It was marked "Discovery post," my name, and my license number, and the—

185. Q. And the what? (Witness takes up the pamphlet.)

186. Q. Hold on (witness puts pamphlet down). A. My recollection is that that is all that was on it; but I was particular to see that it was according to the regulations.

187. Q. Had you your regulations in your hands at the time of making this? A. No, not at the very time; it was zero weather.

40 188. Q. It is your recollection that you had everything according to the regulations, that you are able to speak from, but you cannot remember anything further on the post than what you have said? A. I can remember that the discovery post was marked "Discovery post, W. J. Green miner's license number 1346," I think that is all. If there was anything more I have forgotten it.

189. Q. Who marked the post? A. I think I did myself, but I won't be positive.

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190. Q. Then who showed you where to plant that discovery post? A. Gordon.

191. Q. He showed you where to plant it? A. He did.

192. Q. So far as you knew it might have been twenty feet from the vein; is that right? A. It might.

193. Q. And the post was simply planted on the ice, did not go through the ice? A. No it did not go through the ice. I remember Gordon measuring off from the drill casing a certain distance, and explaining to me that at that angle that would bring it to a certain point, and I took his calculation as correct.

194. Q. He pointed out, and you planted the post. Then what did you do next; proceed to plant the other four posts? A. Yes.

195. Q. Which one did you plant first? A. The one on the shore opposite—

196. Q. Opposite the town? A. I won't be positive as to that.

197. Q. You cannot tell? A. No, the surveyor surveyed the claim out, and just as to when the posts were put down—

198. Q. They were put down that night? A. Oh yes, they were put down that night; everything was completed that night; but at one time I was at one end of the claim doing something on instructions from the surveyor, and another end another time, so that I did not follow the exact operations in succession.

199. Q. You depended for that part of your affidavit for discovery on the surveyor, as to the description and so on? A. Yes. I carried the chain part of the time.

200. Q. Then four corner posts were driven; what marking had they on them; take Number one post first, what marking had it? A. I am not sure whether we had the name of the claim on the post or not, but in any case there would be Number one post W. J. Green miner's license number 1346.

201. Q. That was on Number 1 post? A. Yes.

202. Q. And the Number 1 was on which side of the post—north, east, south or west? A. I don't remember now.

203. Q. Then those four posts were planted on the ice? A. Yes.

204. Q. With stones around them? A. Yes.

205. Q. And you were up there after the ice went out? A. Yes.

206. Q. How soon after the ice went out; in May? A. About May.

207. Q. And the posts had gone then? A. I did not search to see whether they had or not.

208. Q. Were you in Cobalt? A. Yes.

209. Q. Were you down near the lake? A. No.

210. Q. You did not go down to look at the place? A. No, any more than I noticed in a casual way that the house had gone.

211. Q. You would have seen the posts if they had been left on the shore of the lake? A. No, because I was not on the shore of the lake.

212. Q. But on the shore next the town? A. No, I would not necessarily have noticed.

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213. Q. You did not look, anyway, to see? A. No.

214. Q. These four corner stakes did not go through the ice? A. No.

215. Q. So that they just lay in holes in the ice, with stones around their base to support them? A. Yes.

216. Q. Where did you get the stones? A. From the shore.

217. Q. Wasn't the shore covered with snow? A. No, we got the stones next the railway. There were mounds around each stake supporting it.

218. Q. That is the way they were supported? A. We dug into the ice a little way with the axe, and put the stake in and piled up stones to support

10 it.

219. Q. You did not put any stone monument around the border of the lake or across the lake on the lines of the claim? A. I don't think so.

220. Q. You would have known it if there had been? A. I think I would.

221. Q. Did you drive any other posts besides these five anywhere? A. I am not sure whether there were any witness posts or not, if so, that would be done when they were running the lines around when I would not be there.

222. Q. But if there are any you don't know? A. I don't know.

20 223. Q. And you don't know what the surveyor tied his survey up to? A. No.

224. Q. Have you ever asked him for any field notes or anything? A. No.

225. Q. Has Major Gordon ever given you any intimation that he knew where it was tied up to? A. No.

226. Q. Then you went over the next morning after the discovery to Haileybury? A. Yes.

227. Q. And offered your claim for record to Mr. Smith? A. Yes.

228. Q. And he at once told you that there was an order in council or 30 something that prevented him from recording it? A. He did not put it that way; he didn't know anything about the order in council until Mr. Clark told him.

229. Q. But he knew that there was something to prevent him recording it? A. Yes, he said he had instructions not to record claims on Cobalt Lake.

230. Q. Had you ever heard any discussion about Cobalt Lake during all that time? A. No.

MR. BRADFORD: Do you mean about being closed?

MR. OSLER: I put it generally.

40 231. Q. I suppose they would not record your transfer either? A. I don't know as to that. I was not present.

232. Q. You did not tender the transfer yourself? A. No.

233. Q. You have never performed any working conditions on it? A. No, we offered to.

234. Q. To whom? A. To the Government.

235. Q. But you never actually performed any? A. No.

RECORD.

*In the
High
Court of
Justice.*

No. 12.
Evidence of
W. J.
Green,
(de bene
esse)
Cross-ex-
amined by
Mr. Osler.
—continued

236. Q. Was the reply in the form of a letter? A. I think it was.

237. Q. It was not verbal, anyway? A. No.

238. Q. Have you ever been up to Cobalt since May of last year? A. I was there in July.

239. Q. Were the stakes there then? A. Didn't look.

240. Q. Then as to the drilling; there was about thirty feet of water?

A. I think so.

241. Q. Twenty feet of mud? A. Twenty or 25; I think twenty-five.

242. Q. Then you would have only fifteen feet of rock? A. Yes.

243. Q. And in the fifteen feet of rock you struck the ledge or vein? 10 A. Yes.

244. Q. And you would estimate the difficulties of the engineering purely from a layman's point of view? A. Yes.

245. Q. That is, the difficulty of operating a diamond drill at that depth and under those circumstances? A. Yes, although I would have said that the greater difficulty was in finding the vein in such a position.

246. Q. That is another point. I was only asking you as to the difficulty of operating your apparatus. Then up to the time you transferred your rights, whatever they may have been, to the Florence Company, the Government had refused to allow your claim? A. They had— 20

247. Q. And you transferred only what right you had? A. Yes.

248. Q. There is no doubt about it, that you are the man who made the discovery, if anyone did? A. I beg pardon?

249. Q. You are the man who made the discovery if anyone did?

A. Yes.

250. Q. No one else can claim discovery on that? A. No.

251. Q. Why did you tender seventy dollars for the Patent? A. That was on advice of solicitor.

252. Q. You were aware having read these regulations carefully, that you could not secure the Patent until working conditions had been complied with? A. Yes, could not procure it. 30

253. Q. So that the tender of the money was premature in any event, even if your tender had been allowed.

MR. BRADFORD: That is a question of law, isn't it?

MR. OSLER: I am asking whether he knows that it was? A. Ordinarily the working conditions would be performed first.

254. Q. In other words the regulations specifically provide that after working conditions which are set out are performed you may obtain a Patent upon paying a fee and so on? A. Yes.

255. Q. And those working conditions had not to your knowledge been 40 performed when you tendered the money? A. They had not been performed.

256. Q. And the acceptance and holding of that money in ordinary circumstances would not have been looked on by you as binding on the Government, compelling them to give a Patent? A. That is a question of law again.

RECORD.

*In the
High
Court of
Justice.*

No. 12.

Evidence of
W. J.
Green,
(de bene
esse)
Cross-ex-
amined by
Mr. Osler,
—*continued*

257. Q. I am asking how you would look at it? A. We applied to have the privilege of performing the working conditions—

258. Q. Wait a minute. What I am asking is this. Suppose you had in the ordinary course of events staked out your claim, and without performing working conditions had sent in your money to the Department, and they had held it, would you consider that that entitled you to the land, to the Patent? A. I have forgotten now what discussion Mr. Clark and I had on the subject.

259. Q. You paid it, in other words to strengthen your case?

10 MR. BRADFORD: To protect his interests.

WITNESS: That is a better way of putting it: to protect our interests. We were pressing for the privilege of performing the working conditions, whereas the Government said they would arrest us if we went back there.

MR. OSLER: I don't know that that is evidence.

260. Q. You made your discovery on the 7th of March; what day did you begin to suspect that silver was there; first, what time on the 7th did you discover it? A. About four o'clock.

261. Q. Then when did you wire Mr. Clark? A. I have forgotten now.

262. Q. Was it on the day before, the 6th? A. I cannot say.

20 263. Q. Surely you can remember when you were first certain that silver was there, from what Major Gordon said? A. You mean to say that the indications were strong of getting the vein quickly?

264. Q. Such an indication that you could see there was valuable mineral in place? A. The indications on the 6th of March, the day previous to that.

265. Q. These indications were sufficient to indicate valuable mineral?

A. Yes according to Gordon's judgment.

266. Q. But you preferred of course to wait until you got the vein itself before making your application and affidavit? A. Something that 30 looked like the wall of a vein would not have been actual mineral.

267. Q. It would have assayed many ounces to the ton? A. I have assayed such in British Columbia without results; I have had no experience in Cobalt.

268. Q. But Major Gordon apparently was satisfied that you were going to make a discovery? A. He was satisfied from the very outset, and we had implicit faith in him.

269. Q. Perhaps I had better put it in another way. You had not sufficient personal experience to know that the walls of a vein within several feet carry sufficient silver to pay? A. No.

40 270. Q. You don't know that? A. I don't know that.

271. Q. You don't know that the sidewalls of the vein for one or two feet are impregnated with silver to such an extent as to make it paying ore? A. No, I have seen since Cobalt rock that was not strictly vein matter which was said to carry values; but at that time I had no experience of Cobalt whatever.

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*In the
High
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Justice.*

No. 12.

Evidence of

W. J.
Green.
(de bene
esse)Cross-ex-
amined by
Mr. Osler.
—continued

272. Q. You did not assay any of these drillings? A. No, it was not necessary; it showed there.

273. Q. Did you make personal application for the Florence Mining Company's license? A. No, had nothing to do with it.

274. Q. Do you know when it was got? A. Know nothing about it.

275. Q. You don't know where it was got, or anything about it?

A. Nothing whatever about it.

276. Q. You made personal application for your own license? A. I did.

277. Q. When? A. On the morning of the 7th March. (License handed to Mr. Osler.)

10

278. Q. Was that after the arrival of Mr. Clark? A. Which?

279. Q. The application for your license? A. No; I think I went up to Haileybury and got the license first.

280. Q. You went up to Haileybury on the morning of the 7th? A. Yes.

281. Q. And then you came down and you met him? A. At the station?

282. Q. Yes, at Cobalt? A. I drove up.

283. Q. What time did you leave Cobalt? A. I think about nine o'clock in the morning.

284. Q. And you got back—? A. I was back in—

285. Q. What time did you get to Haileybury? A. In about an hour from that time; I presume about ten o'clock in the morning.

286. Q. About; and you took your license. Did you go up for anything else? A. No.

287. Q. And you got back about eleven o'clock and met Mr. Clark; and did you go over then to the drill? A. Yes.

288. Q. And had they stopped drilling at that time? A. No, they were still working. I can't say as to when I was away, but they were drilling when I got back, and the mineral was brought up while I was there.

289. Q. That would be about eleven o'clock in the morning. A. No, they were drilling when I got back; I don't know what time I got back. I met Mr. Clark at the station.

290. Q. He could only come at two o'clock? A. Yes.

291. Q. So that you must have been longer at Haileybury than you thought? A. I think I got back to the house on the ice in time for dinner.

292. Q. And then you went over and met Mr. Clark? A. Then I went over and met Mr. Clark.

293. Q. Did they stop work for dinner? A. Yes, they always did.

294. Q. Did they lift the core at dinner time? A. Not necessarily.

295. Q. Did they on that occasion? A. They lift the core about every two or three feet of drilling.

40

296. Q. When did they lift the core: about four o'clock, when you made the discovery? A. I cannot say definitely as to that.

297. Q. How do you fix four o'clock for the discovery; did you lift the core then? A. It may have been three o'clock. I fixed the time at four o'clock because in the interval I had examined the cuttings thoroughly under the microscope, so that there could be no question about that being

valuable mineral. It might have been half-past three. The core was pulled out first.

298. Q. Then you saw what you had got? A. The core taken out, then the drill put down and the water pressure put on, and then the cuttings from the vein were pumped out, as I explained in my examination for discovery; and then when the cuttings were all pumped out and in a pan so that we could examine them and make an examination—by that time it was four o'clock. That is why I fix the time at four o'clock.

299. Q. Did you do any more drilling after that? A. No, that finished 10 the drilling.

300. Q. Were you through the vein at that time? A. I cannot say as to that.

301. Q. Who would be able to say as to that? A. Major Gordon.

302. Q. You don't know whether you were through or not? A. No, for this reason: the core was broken and we lost a large portion of it in the hole. I should have explained that we lost a part of the core which went from the core barrel in the hole when we pulled the core barrel up; then we put the chopping bit in and chopped up the core in the bottom of the hole, and pumped it up in the form of cuttings, by water pressure.

20 303. Q. You don't know whether you were really through the vein or not? A. No.

304. Q. Can you tell me how many feet a day you were working at that time? A. It was very uncertain work.

305. Q. You did not keep any record? A. No.

306. Q. Did Major Gordon? A. He may have done so. I was not there all the time.

307. Q. So that you cannot tell me how far off the vein you were, say, three days before or two days before, or one day before? A. No. The work was irregular. Accidents of one kind or another would happen.

30 Sometimes they were working and sometimes they were not working.

308. Q. The company allege in their Statement of Claim that it was represented by the Ontario Government that if you made a discovery of valuable ore mineral in place under Cobalt Lake you would be entitled to it? A. That is in the Statement of Claim.

309. Q. Yes, that is what you claim. I presume that the only representations that were made to you were those you have already stated? A. Yes.

310. Q. And no others? A. And no others.

311. Q. With reference to that map with the marks "A" on it, did you 40 question her as to that at all? A. I did not see the map at that time. It was pulled out by the Mining Recorder, Mr. Smith, to Mr. Clark and myself.

MR. BRADFORD: He is asking you about the map.

312. MR. OSLER: Q. Exhibit 2, that you got from the Recorder's office at Haileybury; you say you did not see that? A. Oh, I saw that.

313. Q. Did you enquire about these blue "A's" on it; did you make

RECORD.

*In the
High
Court of
Justice.*

No. 12.
Evidence of
W. J.
Green,
(*de *esse**
esse)
Cross-ex-
amined by
Mr. Osler,
—*continued*

RECORD.

*In the
High
Court of
Justice.*No. 12.
Evidence of
W. J.
Green
(de bene
esse)
Cross-ex-
amined by
Mr. Osler,
—continued

enquiry about those? A. In the first place the young lady in Toronto told me that I would find the map there marked.

314. Q. But I am asking you whether you made any enquiries about these letters "A"? A. Yes, I asked Miss Smith if those "A's" referred to claims applied for. She said Yes; and "L" leased, "P" for patent; so that seemed to be quite clear.

315. Q. I suppose, like other people who were after something good, you were rather anxious not to direct her attention to any particular point? A. No, I had no such notion in my mind.

316. Q. I thought you said before that you did not want to let anyone 10 forestall you by letting them know what you were going to do? A. That is true in that sense, if others were overhearing or anything of that kind certainly I would be very careful not to mention it.

RE-EXAMINED by Mr. Bradford:

No. 12.
Evidence of
W. J.
Green
(de bene
esse)
Re-exam-
ined by
Mr. Brad-
ford.

317. Q. When you went to Haileybury with Mr. Clark to record the claim, was any objection taken to the staking or any other of the conditions at that time? A. No objection whatever.

MR. OSLER: That surely is not re-examination?

MR. BRADFORD: I think so.

MR. OSLER: All I have asked him is as to the staking, which was what 20 you asked him in chief.

MR. BRADFORD: It is as to some questions you asked that I am asking this.

(Some further discussion follows.)

318. MR. BRADFORD: Q. Was any objection taken except the instructions you had from Toronto? A. None whatever.

319. Q. Then you mentioned in answering questions of my learned friend that Mr. Smith did not say anything about orders in council till Mr. Clark told him? A. That is true.

320. Q. What did you mean by what Mr. Clark told him? A. Mr. Clark 30 said that the only possible way that the claim could be withdrawn would be by Order-in-Council, and that there were none such.

231. MR. OSLER: Q. That is at the time of attempting to record the claim? A. Yes, that is at the time of attempting to record the claim.

I hereby certify the foregoing to be the examination of William James Green, taken before me in shorthand on the first day of May, 1907.

"FRANK C. COOKE,"

Commissioner.

Certified to be a true copy.

"Robert Tyson,"
Shorthand writer.

E X H I B I T S

EXHIBIT 1.

Toronto, January 18th, 1904.

AUBREY WHITE, Esq.,
 Asst. Commissioner Crown Lands Dept.,
 Parliament Buildings,
 Toronto.

Dear Sir,—

On behalf of Mr. William Clarke Chambers, who has applied for a Lease of Location R.L. 404, and who has also applied for a license to occupy and mine under the Road Allowance on both sides of the Location, I beg to apply for a Lease of the land under the waters of Long Lake and Peterson Lake respectively, lying opposite the shores of R.L. 404, extending to midchannel. This land was covered by the original application previous to the withdrawal from sale under Order-in-Council.

I enclose you Mr. Chambers' affidavit showing that there is no adverse claim.

Yours truly,

JAS. B. O'BRIAN.

PROVINCE OF ONTARIO

To Wit:

20 IN THE MATTER OF WATER LOTS OPPOSITE MINING
 LOCATION R.L. 404.

I, WILLIAM CLARKE CHAMBERS, of the Village of Haileybury, in the District of Nipissing, contractor, make oath and say:—

- (1) I am the Applicant for a Lease of said Location.
- (2) The mineral veins discovered on said Location run approximately east and west and to my certain knowledge one of them out-crops within two hundred feet of the shore of Long Lake, and I verily believe that it will eventually be traced across the road allowance and into Long Lake.
- (3) It is probable that said mineral veins also run easterly into Peterson Lake.
- (4) From my knowledge of the mineral formation there I verily believe that it is advisable and proper that the Lessee of said Location be granted a license to occupy and mine under the Road Allowances abutting

RECORD.

*In the
 High
 Court of
 Justice.*

No. 13.
 Letter from
 Jas. B.
 O'Brian to
 Aubrey
 White.
 Jan. 18th,
 1904.

No. 13.
 Application
 of William
 Clarke
 Chambers.
 Jan. 15th,
 1904.

RECORD.

In the
High
Court of
Justice.

No. 13.
Application
of William
Clarke
Chambers.
Jan. 15th,
1904.
—continued

on said Lakes and be also given a Lease of the land under the waters of said Lakes opposite the said Location and extending approximately to the middle of the Lake.

(5) I am familiar with the locality and I say that there is no person in possession of said Road Allowances or Water Lots, and there are no improvements thereon, nor any visible trace or indication of work having been done thereon by any person or persons for mining or other purposes.

(6) To the best of my knowledge and belief there is no claim to said License or Lease of said Road Allowances and Water Lots respectively adverse to mine, on the ground of priority of discovery of mineral thereon or otherwise. 10

(7) The shore of Long Lake opposite my Location is rocky and steep, and it would not be practicable to make use of the Road Allowance abutting thereon, and I believe the same may be said of the said Road Allowance abutting on Peterson Lake, adjoining my Location.

Sworn before me at the Town of Har-
rison in the County of Wellington,
this 15th day of January,
A.D. 1904.

W. C. CHAMBERS.

20

ANSON SPOTTON,
A Commissioner, &c.

No. 14.
Letter from
Masten,
Starr &
Spence to
Depart-
ment
of Crown
Lands.
June 16th,
1905.

EXHIBIT 2.

Department of Crown Lands,
Survey's Branch,
Parliament Buildings, Toronto.

Toronto, June 16th, 1905.

Re Cobalt Lake.

Dear Sirs,—

We hand to you herewith duplicate application of Milo H. Bessey under 30 the Mining Act for Cobalt Lake, in the Township of Coleman, Temiscaming Mining Division, also blue print sketch to accompany the application. The original of this application was duly made to Geo. T. Smith, Esquire, Inspector of the Temiscaming Mining Division, and recorded by him on the 8th of June, but we learn from search in your Department this morning, that the report of it has not yet come down to you. As we understand that some questions regarding the lands covered by this lake and applied for by our client are likely to arise very shortly in the Department, we deem it proper to file this duplicate with you bringing your attention to the fact at the same time that it really became of record under 40 the applications recorded by Mr. Smith on the 8th of June.

Will you kindly see that in case any other applications on the lake are coming up for consideration, that this application is brought to the attention of the Minister at the same time?

Encl. 2.

Del.

Yours faithfully,

MASTEN, STARR & SPENCE.

RECORD.

*In the
High
Court of
Justice.*

No. 14.

Letter from
Masten,
Starr &
Spence to
Depart-
ment
of Crown
Lands.
June 16th,
1905.

—continued

No. 14.
Application
of Milo H.
Bessey,
June 8th,
1905.

TEMISKAMING MINING DIVISION.

NOTICE OF MINING CLAIM AND AFFIDAVIT OF DISCOVERY.

To the Inspector of Mines.

Sir: I, Milo H. Bessey of the Village of Magnetawan, District of Nipissing, holder of Miner's License No. 98, do hereby present a Notice of Claim under the terms and provisions of the Mines Act, R.S.O. 1897, and of the Regulations for Mining Divisions made thereunder, for a Mining Claim consisting of eighty acres more or less according to the sketch or plan attached hereto, and which may be more particularly described as follows: That body of water lying within the Township of Coleman in the District of Nipissing and Province of Ontario known and described on the map or plan of said Township as "Cobalt Lake" together with the land lying and situated underneath the said Lake.

The discovery posts are as shown on the diagram. Discovery was made on the fifth day of May, 1905, at three o'clock p.m.

The Claim was staked the fifth day of May, 1905, and named the Cobalt Lake claim.

Dated at Haileybury 8th June, 1905.

MILO H. BESSEY.

Signature of Licensee in full.

EXHIBIT 3.

APPLICATION OF BESSEY AND DREANY FOR ROAD ALLOWANCE.

Not printed.

No. 15.
Application
of Bessey
& Dreany
July 18th,
1905.

RECORD.

*In the
High
Court of
Justice.*

No. 16.

Letter,
Thomas W.
Gibson
to George
T. Smith.
13th July,
1905.

Dear Sir:

July 13th, 1905.

I beg to inform you that an order has been made by the Minister of Lands and Mines to issue patent of the mines, minerals and mining rights of the road allowance in front of Mining Location J. B. 1, to the owners of the said location, namely, Robert Gorman et al, under Section 30 of the Municipal Amendment Act, 1904, the patent to contain a proviso protecting the road for public travel, etc., as provided in the said section, and also for a patent of that part of the bed of Cobalt Lake lying immediately in front of their location and covering an area of 4 acres, according to the sketch 10 herewith enclosed.

I may say that the original application made by Messrs. McKinley and Darragh for Location J. B. 1 included the road allowance and this portion of the bed of the lake, but the location only was granted, as it was deemed advisable by the Department of that time not to dispose of the bed of Cobalt Lake until it was seen whether or not it would be required in connection with any smelting or reduction works which might be established in the neighborhood or similar purposes. The application of Messrs. McKinley & Darragh would have been allowed at that time had it not been for this.

20

I am further directed by the Minister to notify you that you may now accept and record claims on the bed of Cobalt Lake in accordance with the regulations in force in the Mining Division, but that before doing so you must satisfy yourself as provided in the Order-in-Council of the 8th inst. that an actual discovery of valuable mineral in place has been made on the land applied for. Notice of these instructions should be given by you by posting up a memorandum to this effect on the walls of your office.

Yours very truly,

THOS. W. GIBSON,
Director.

GEORGE T. SMITH, Esq.,
Inspector, Temiskaming Mining Division,
Haileybury, Ont.

30

RECORD.

*In the
High
Court of
Justice.*

EXHIBIT 4.

TEMISKAMING MINING DIVISION.

Haileybury, Ont.

No. 17.
Report of
E. T.
Corkill.
17th Aug.,
1905.

Re alleged discoveries on Cobalt Lake made by M. H. Bessey on behalf of H. S. Strathy of Toronto, on the 5th May, 1905, at 3 o'clock p.m.

According to plan furnished by M. H. Bessey there are two discovery posts and three indications of wash ore. I visited the discovery posts and found they are on veins situate on the road allowance around Cobalt Lake. These veins were both discovered and worked last year so that no discovery of valuable ore or mineral was made by the party named.

In regard to the wash ore that being not in place can not be considered a valuable discovery.

In my opinion the said M. H. Bessey has made no discovery but only staked on veins previously discovered.

E. T. CORKILL,

Haileybury, Aug. 17th, '05.

Inspector of Mines.

RECORD.

In the
High
Court of
Justice.No. 18.
Revised
Regula-
tions of
Depart-
ment of
Crown
Lands.p70
and volume
after

EXHIBIT 16.

Revised and Amended

REGULATIONS FOR MINING DIVISIONS.

Including Order in Council of 30th October, 1905.

Michipicoten Mining Division—description not printed.

Temiskaming Mining Division. The boundaries of this division are also omitted but include the Township of Coleman. This Division was set apart as such by Order in Council April 5, 1905.

REGULATIONS FOR MINING DIVISIONS.

Amended and Approved by Order in Council April 5, 1905.

10

1. Any person may explore for minerals on any Crown lands not for the time being marked or staked out and occupied, except on such lands as by the Lieutenant-Governor-in-Council may have been withdrawn from sale, location or exploration as being valuable for their pine timber or for any other reason.

2. Where Crown lands are situated within a Mining Division they may be occupied as Mining Claims under miners' licenses.

Sections 3 to 8 containing provisions as to appointment of Inspector not printed.

Sections 9 and 10 as to powers of Director of Bureau of Mines not 30 printed.

11. The Lieutenant-Governor-in-Council may by Order declare any tract of country therein described to be a Mining Division; and by any subsequent Order-in-Council may add to or diminish the limits of the Division, or may otherwise amend any such Order or may cancel the same.

12. On payment of a fee of \$10, or such other sum as may be fixed by regulation, the Director of the Bureau of Mines (or the Inspector of a Division when so authorized by the Minister of Lands and Mines) may grant to any person, registered partnership, or mining company incorporated under the laws of the Province applying therefor a license to be called a "miner's license," which shall be in force for one year from the date thereof, and shall not be transferable except with the consent of the Director of the Bureau or the Inspector of the Division upon payment of a fee of \$5.00. 40

13. The person, partnership or company named in a license shall be called the "licensee," and upon payment of the fee fixed by law or regula-

RECORD.

In the
High
Court of
Justice.

No. 18.

Revised
Regula-
tions of
Depart-
ment of
Crown
Lands.

—continued

tion, such licensee shall have the right to renewal if application is made therefor before the expiration of the license or within ten days thereafter.

14. Every licensee shall produce and exhibit his license to the Inspector for the Division, and prove to the satisfaction of the Inspector that it is in force, at the time of recording his claim, and at any other time when required by the Inspector so to do.

15. A miner's license shall authorize the licensee to explore any portion of the Mining Division named in his license, and to mine during one year from the date of the license on any mining claim marked or staked out by such licensee on Crown lands, and he may employ any person to assist him in working such claim, or may organize a company to work the same, but no licensee shall have the right to cut down or use any timber which may be upon his claim except for purposes of building, fencing or fuel, or other purposes necessary for working the mine upon the said claim.

16. A licensee who discovers a vein, lode or other deposit of ore or mineral in place within the Division mentioned in his license shall have the right to mark or stake out thereon a mining claim, provided that it is not included in a claim occupied by another licensee, or is not on Crown lands withdrawn from location or exploration, or on lands the minerals and mining rights whereof have been reserved by the Crown, provided that the licensee may be required to prove to the satisfaction of the Inspector that he has discovered a valuable vein, lode or other deposit of ore or mineral in place upon the claim in question; and he shall have the right to work the same, or he may transfer his interest therein to another licensee upon payment of a fee of \$5 to the Inspector of the Division, who shall record the transfer in his book.

17. If the working conditions have been complied with as hereinafter required for a period of four years on a claim of twenty chains square, or 30 for three years on a claim fifteen chains square or less, or when the equivalent of such working conditions has been complied with in a less period of time in the respective cases, the licensee may apply for and obtain a certificate of full performance of the working conditions for the claim free from any further working conditions, renewal fee or miner's license to work the same, and also a patent or lease for the land embraced in the claim, free from any further working conditions and miner's license to work the same, upon a survey thereof being made and filed according to section 27 of *The Mines Act R. S. O. 1897*, the boundary lines in each survey to follow the courses of the lines of the claim as originally staked out 40 and recorded, or as the lines may have subsequently been altered, changed or corrected by the Inspector, and upon payment therefor to the Department of Lands and Mines of the purchase price or first year's rental at a rate per acre as provided in sections 31 and 35 respectively of the said Act. The Minister of Lands and Mines in granting patents under this regulation may grant at the same price to the owner of a claim any con-

RECORD. contiguous fraction or piece of land not staked of a less size than ten acres if surrounded by staked claims.

In the
High
Court of
Justice.

No. 18.
Revised
Regula-
tions of
Depart-
ment of
Crown
Lands.
—continued

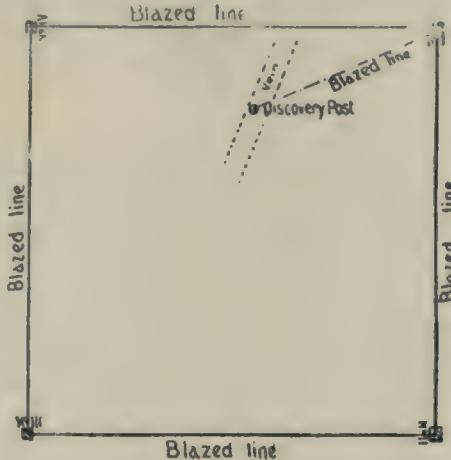


Fig No 1.

18. (1) A mining claim shall be marked or staked out by planting a discovery post of wood or iron (on which is written or stamped the name of the licensee, number of his license and date of his discovery, upon an outcropping or show of ore or mineral in place within the boundaries of the claim, and by planting at each of the four corners a post of wood or iron in the order following, viz., No. I at the northeast corner, No. II at the southeast corner, No. III at the southwest corner, and No. IV at the northwest corner, the number in each case to be on the side of the post towards the 10 post which follows it in the order in which they are named. (See fig. 1.)

(2) If the discovery is situated in territory which has been subdivided into farm lots of 320 acres each, more or less, the claim shall consist of one or other of the following subdivisions of the lot, namely, the northwest quarter of the north half, the northeast quarter of the north half, the southwest quarter of the north half, the south east quarter of the north half, the northwest quarter of the south half, the northeast quarter of the south half, the southwest quarter of the south half, or the southeast quarter of the south half, and one side of the claim shall coincide with so much of one of the four boundaries of the lot as is necessary to make the claim identical with the subdivision of the lot intended to be staked out, and the licensee shall in addition to the requirements of sub-section (1) of this regulation, write plainly on his discovery post the subdivision of the lot covered by his claim. Provided that in the case of lots of broken outline or irregular shape or size, the licensee shall stake out his claim conformably with this clause as nearly as the situation of the ground will admit, the intention being that one side of the claim wherever possible shall fall upon one of the boundaries of the lot, and the area of any such irregularly shaped claim may be less than 40 acres, but shall not exceed 50 acres.

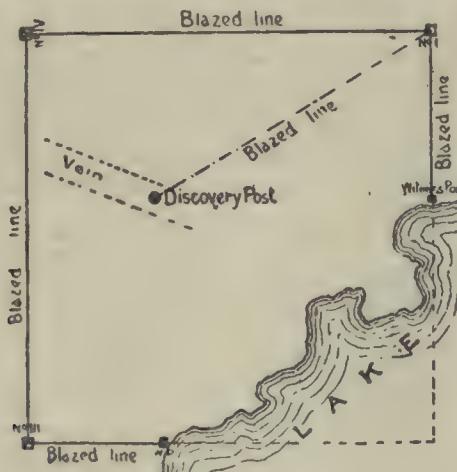


Fig No 2.

est suitable point a witness post, which in that case shall contain the same marks as those prescribed for corner posts, together with the letters "w. p." (witness post) and an indication of the bearing and distance of the site of the true corner from such witness post. (See fig. 2.)

20. Where there are standing trees upon a mining claim so staked out the licensee shall be required to blaze the trees and cut the underbrush along the boundary lines of the claim, and also along a line from the first corner post to the discovery post, and shall plant pickets or stakes on the said lines, and mark plainly on the first corner post the distance to the discovery post. Where there are no standing trees the licensee shall mark the boundary lines of the claim by planting pickets or stakes thereon or by erecting thereon monuments of earth or rock not less than two feet in diameter at the base and at least two feet high, so that the lines can be distinctly seen.

21. A mining claim in unsurveyed territory shall be a square of fifteen chains or 990 feet, horizontal measurement, containing twenty-two and one-half acres, or of such other extent, greater or less, but so as not to exceed a square of twenty chains or 1,320 feet, containing forty acres, and shall be laid out with boundary lines running north and south and east and west astronomically, and the ground included in each claim shall be deemed to be bounded under the surface by lines vertical to the horizon; but an irregular portion of land lying between two or more claims may be staked out with boundaries conterminous thereto, provided that its area shall not exceed forty acres. A valuable waterpower lying within the limits of a claim shall not be deemed as part of it for the uses of the licensee, and a road al-

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of
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—continued

lowance of one chain in width shall be reserved along the water, together with such additional area as in the opinion of the Minister of Lands and Mines may be necessary for the development and utilization of such water power.

22. No more than one claim shall be staked out by any individual licensee upon the same vein, lode or deposit of ore or mineral unless such claim is distant at least sixty chains from the nearest known mine, claim or discovery on the same vein, lode or deposit, but no licensee shall stake out and record in the same Mining Division, within a radius of fifteen miles, more than four claims in one calendar year. 10

23. For each additional mining claim after the first marked or staked out by a licensee, whether upon the same vein, lode or deposit, or upon another, he shall pay to the Inspector of the Division a fee of \$10 a year in advance when recording the same if the area is more than twenty-two and one-half acres, and \$6 if it is twenty-two and one-half acres or less, and a like fee in each case shall be paid for every additional claim so held at the time of renewal of the license.

24. Every Inspector of a Mining Division shall keep a book for the recording of mining claims therein, and such book shall be open to inspection by any person on payment of a fee of twenty cents. He shall also keep 20 displayed in his office a map or maps showing the territory included in the Division, and shall mark thereon all the claims as they are taken up and recorded, and there shall be no charge for examining the same.

25. Every licensee who has marked or staked out a mining claim shall, within thirty days thereafter, supply under oath to the Inspector of the Division an outline sketch or plan thereof, showing the discovery post and corner posts, and the witness posts (if any) and their distances from each other in feet, together with a notice in writing setting forth under oath the name of the licensee and the number of his license, the name (if any) of the claim and its locality, as indicated by some general description or statement, the length of the boundary lines if for any cause they are not regular and the nature of such cause, the situation of the discovery post as indicated by distance and direction from the first corner post, the time when discovery of ore or mineral was made and when the claim was marked or staked out and the date of the said notice; and every licensee shall accompany his sketch or plan and notice with an affidavit showing the discovery of valuable ore or mineral upon the claim by such licensee on his own behalf or on behalf of another licensee and that he has no knowledge and has never heard of any adverse claim by reason of prior discovery or otherwise. The affidavit required in this section to be made by the licensee shall 30 40 be made before the Inspector for the Division.

Section 26 as to surface rights not printed.

Section 27 as to town sites not printed.

28. The Inspector shall forthwith enter in his book the particulars of the notice of claim presented by every licensee, and shall file the notice,

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*In the
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tions of
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ment of
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sketch or plan and affidavit with the records of his office, and if there is no dispute as to the rights of the licensee to the claim by reason of prior discovery or otherwise, the Inspector may at the expiration of ninety days from the date of the record thereof grant to the licensee a certificate of such record.

29. If the licensee fails to comply with the provisions of Regulations 25 so far as they relate to him, or if, having complied with them, he or any person in his behalf shall remove any post for the purpose of changing the boundaries after the plan and notice have been filed, the mining claim 10 marked or staked out by him shall be deemed to be forfeited and abandoned, and all right of the licensee therein shall cease.

30. A mining claim shall also be deemed to be forfeited and abandoned and all right of the licensee therein shall cease in case the miner's license has run out and has not been renewed, or if the annual fee for a claim has not been prepaid, or if \$150 has not been expended upon each claim taken up, except as hereinafter provided, in stripping, or in opening up mines, in sinking shafts, or in other actual mining operations, exclusive of all houses, roads and other like improvements, in every license year, and the said expenditure shall consist of labor actually performed by grown men to be 20 computed at the rate of \$2 per man per day. Nevertheless, it shall be competent for the licensee to prove that during one or more preceding years the extent of mining operations carried on has been adequate to cover the requirements for the year in default, in which case the claim shall not be cancelled.

(a) The Inspector may at any time require the licensee holding any mining claim to point out and identify, either to himself or some other officer appointed for the purpose by the Minister of Lands and Mines, the vein, lode or other deposit of ore or mineral in place described or referred to in the affidavit filed with the Inspector upon which the said claim was recorded, giving the licensee recording such claim or in whose name such claim is recorded at least seven days' personal notice, or notice by registered letter to his address as shown in such record, and upon failure or neglect of such licensee to so point out and identify the said vein, lode or other deposit of ore or mineral in place, or upon it being apparent to the Inspector or other office appointed by the said Minister and inspecting the claim as aforesaid that the alleged discovery is not a bona fide and valuable vein, lode or other deposit of ore or mineral in place, the said Inspector, acting upon his own inspection or upon the written report of such other office, may cancel the said claim and declare it to be null and void by entering such cancellation in the margin of the record and appending his initials thereto, and shall at once notify the licensee thereof by registered letter and post a notice of such cancellation upon the walls of his office; provided that the said licensee shall have the right of appeal from the Inspector's decision to the Minister of Lands and Mines within twenty days from the date of such decision.

If the Inspector or other officer appointed by the said Minister finds

RECORD.

*In the
High
Court of
Justice.*

No. 18.
Revised
Regulations
of
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—continued

that the vein, lode or other deposit of ore or mineral the discovery of which was alleged in the affidavit filed with the Inspector upon which the claim was recorded, was a bona fide and valuable discovery, but that the claim has not been staked out and marked in accordance with the regulations, he may by written notice require the said licensee to stake and mark the said claim in manner conformable to the regulations within a given number of days, not less than seven, and in default of carrying out the terms of the said notice the Inspector may refuse to grant the certificate of no adverse claim provided for in section 28 of these regulations.

Section 31 as to forced working of claims not printed.

10

Section 32 as to combined claims not printed.

Section 33 as to abandoned claims not printed.

Section 34 as to party walls not printed.

Section 35 as to passage to adjoining claim not printed.

Section 36 as to removing stakes not printed.

Sections 37 to 42, both inclusive, as to penalties not printed.

EXHIBIT 17.

Order-in-Council of 30th of October, 1905.

Printed as part of Exhibit 18.

20

RECORD.

EXHIBIT 18.

(Part of Ontario Gazette of November 4th, 1905.)

ORDER-IN-COUNCIL APPROVED BY HIS HONOUR
THE LIEUTENANT GOVERNOR.

The 14th day of August, A.D. 1905.

UPON the recommendation of the Honourable the Minister of Lands and Mines, and considering the importance of the subject, and the desirability of exercising careful judgment in arriving at a conclusion with reference to the adoption of a scheme or system of dealing with the mining 10 question, the Committee of Council advise that all that tract of land or territory formerly known as the Lumsden and Booth Timber Limit, now known as Gillies Brothers Timber Limit, lying on both sides of the Montreal River, in the Nipissing District, containing one hundred square miles more or less, also the lakes known as Cobalt and Kerr Lakes, situated in the Township of Coleman, be withdrawn from exploration for mines and minerals, and from sale, lease or location.

Certified,

J. LONSDALE CAPREOL,
Clerk Executive Council.*Entered over
unwritten*20 ORDER-IN-COUNCIL APPROVED BY HIS HONOUR
THE LIEUTENANT GOVERNOR.No. 20.
Order in
Council of
28th Aug.,
1905.

The 28th August, 1905.

In view of the fact that the Townships of Coleman and Bucke, Lorrain and Hudson, in the District of Nipissing, are shown to be rich in ores and minerals, and upon the recommendation of the Honourable the Minister of Lands and Mines the Committee of Council advise that such parts of the said townships as have not already been leased or sold be forthwith withdrawn from sale and lease under the Mines Act, and be set apart under Section Thirty-three of the said Act; this, however, not to interfere with 30 the rights of anyone who has heretofore made application for mining lands in the said townships.

Certified,

J. LONSDALE CAPREOL,
Clerk Executive Council.ORDER-IN-COUNCIL APPROVED BY HIS HONOUR
THE LIEUTENANT GOVERNOR.No. 20.
Order in
Council of
30th Oct.,
1905.

The 30th day of October, A.D. 1905.

Having reference to the memorandum of the Director of the Bureau of Mines, dated 17th October, 1905, and upon the recommendation of the

*In the
High
Court of
Justice.*No. 20.
Order in
Council of
14th Aug.,
1905.

RECORD.

*In the
High
Court of
Justice.*

No. 20.
Order in
Council of
30th Oct.,
1905.

—continued

Minister of Lands and Mines, the Committee of Council advise that notwithstanding the Order-in-Council of 28th August, 1905, withdrawing from sale or lease such parts of the Townships of Coleman, Bucke, Lorrain and Hudson in the Temiskaming Mining Division as had not theretofore been disposed of, the Inspector of the Mining Division be authorized to record mining claims situated in the said townships under the amended regulations for Mining Divisions on condition that all such mining claims recorded on or after the said 28th day of August, 1905, shall be subject to all amendments or additions to the mining laws or regulations as regards working conditions, taxation or any other matter whatsoever which may be made or authorized by the Legislative Assembly of Ontario at its next ensuing session, and on condition that the applicants for such mining claims agree in writing to be bound by such amendments, additions and regulations hereinbefore referred to. 10

The committee further advise that all mining claims in the Township of Coleman taken up or recorded on or after the 28th day of August, 1905, the date of the aforesaid Order-in-Council, shall be rectangular in form and of the following dimensions, namely, ten chains in width by twenty chains in length, containing twenty acres in an ordinary lot, containing three hundred and twenty acres, more or less, each such mining claim shall be composed of the north or south half or the east or west half, as the case may be, of any one of the eight forty acre parts thereof caused by its subdivision into the north and south halves, and these respectively into the north-east, north-west, south-east and south-west quarters. 20

And a claim may be laid out with the length north and south or east and west at the option of the licensee taking up the same, except where a twenty acre claim has previously been taken up in the same forty acre subdivision, when the claim shall consist of the remaining twenty acres. Provided that in the case of lots or parcels of broken outline, or of irregular shape or size, the claim may be of irregular shape and of greater or less area than twenty acres, but not to exceed thirty acres. 30

And the committee further advise that the limits of the Temiskaming Mining Division as fixed by the Order-in-Council of 5th April, 1905, establishing the same, be amended by detaching therefrom the Township of Coleman, and constituting the said township a separate Mining Division, under the name and title of the Coleman Mining Division, with the same Inspector and Head Office as the Temiskaming Mining Division, and subject to the amended regulations for Mining Divisions, save as is hereinbefore provided. 40

Respectfully submitted,

J. P. WHITNEY,

Chairman.

J. LONSDALE CAPREOL,

C. E. C.

I hereby certify that the above is a true copy of an Order made up on the 30th day of October, A.D. 1905, by His Honour Sir William Mor-

timer Clark, etc., etc., etc., Lieutenant Governor of the Province of Ontario in Council. RECORD.

"J. LONSDALE CAPREOL,"
Clerk Executive Council, Ontario. *In the
High
Court of
Justice.*

No. 20.
Order in
Council of
30th Oct.,
1905.
—*continued*

EXHIBIT 10.

No. 21.
Miner's
License to
W. J.
Green
of 7th
March,
1906

No. 1346

\$10.00

PROVINCE OF ONTARIO.

TEMISKAMING MINING DIVISION AND COLEMAN

10

MINING DIVISION.

Bureau of Mines,

Haileybury, Mar. 7th, 1906.

Miner's License

Issued to W. J. Green of Toronto, Ont., in consideration of the payment of a fee of ten dollars, under the provisions of the Mines Act, to be in force for one year from the date hereof.

"GEO. T. SMITH,"
For Director.

RECORD.

*In the
High
Court of
Justice.*

No. 22.
Application
of William
J. Green.
8th March,
1906.

EXHIBIT 6.

TEMISKAMING MINING DIVISION.

NOTICE OF MINING CLAIM AND AFFIDAVIT OF DISCOVERY.

To the Inspector of Mines:

Sir,—

I, William James Green of the City of Toronto in the County of York, Esquire, holder of Miner's License No. 1346, do hereby present a Notice of Claim under the terms and provisions of the Mines Act, R.S.O. 1897 and of the Regulations for Mining Divisions made thereunder, for a Mining Claim consisting of twenty acres more or less, according to the sketch or plan attached hereto, and which may be more particularly described as follows:

That part of Cobalt Lake lying west of Mining Location R.L. 404 including a small island therein as shown in said sketch. The discovery post is 253 feet southwesterly from Post No. 1, which is one chain west of the southwest angle of R.L. 401.

The boundary from post No. 1 to post No. 2 follows the shore line of the said lake and is consequently irregular. From post number two to post number three is 718 feet north astronomically. From post number three to post number four the shore line is followed. From post number four to post number one is 326 feet east astronomically.

I hereby acknowledge that this mining claim is taken up under the amended regulations for Mining Divisions, and on the understanding, which I hereby agree to, that the claim is so taken subject to all amendments or additions to the mining laws or regulations as regards working conditions, taxation or any other matter whatsoever which may be made or authorized by the Legislative Assembly of Ontario at its session next ensuing after the 30th day of October, 1905, and agree to be bound by such amendments, additions and regulations.

The discovery post is situate 253 feet from No. 1 post.

30

Discovery was made on the seventh day of March, 1906, at 4 o'clock p.m.

The claim was staked on 7th day of March, 1906, and named the Diamond Claim.

WILLIAM JAMES GREEN.

Dated at Haileybury, March 8th, 1906. (Signature of Licensee in full.)

This Affidavit must be made before the Inspector of the Mining Division in which the claim is situated.

AFFIDAVIT.

DISTRICT OF NIPISSING

To WIT:

I, WILLIAM JAMES GREEN of the City of Toronto in the County of York, Esquire, make oath and say:

1. That on the seventh day of March, 1906, and at the hour of 4 o'clock p.m., I discovered valuable ore or mineral in place on the Mining Claim named and described in the Notice endorsed hereon and in the sketch or plan attached thereto, that is to say:

A calcite vein carrying cobalt and silver.

2. That I have no knowledge and have never heard of any adverse claim to the said Mining Claim by reason of prior discovery, improvement, occupation or otherwise.

3. That the sketch or plan hereto attached is correct and shows the discovery post, and corner posts and the witness posts, and their distances from each other in feet, and that all the particulars set out in the said notice are true and correct.

4. That the application for said Mining Claim is made on behalf of myself of Toronto in the County of York.

SWORN before me at Haileybury, in
the District of Nipissing, this 8th
day of March, A.D. 1906.

W. J. GREEN.

GEO. T. SMITH,

Inspector, Temiskaming Mining Division.

RECORD.

*In the
High
Court of
Justice.*

— No. 22.

Application
of William
J. Green.
8th March,
1906.

—continued

EXHIBIT 11.

PROVINCE OF ONTARIO.

No. 20042

TREASURY DEPARTMENT.

Toronto, 9th Mch., 1906.

Received from J. M. Clark

the sum of SEVENTY DOLLARS.

On account of Mg. Location W. of R.L. 404.

\$70.

SURVEY 14090

GEO. W. DUNCAN.

No. 23.

Receipt of
Depart-
ment
of Lands
and Mines
to J. M.
Clark for
\$70, 9th
March,
1906, for
Mining
Location,
J. S. 71.

RECORD.

*In the
High
Court of
Justice.,*

No. 24.
Letter,
Thomas W. Gibson to Clark, McPherson, Campbell & Jarvis.
16th March 1906.

Gentlemen,—

Replying to your letter of the 13th inst., with respect to the application of Mr. W. J. Green, for the bed of Cobalt Lake, I have to say, that as the Department is not prepared to consider Mr. Green's application, there would appear to be nothing to gain by examining the evidence as to Mr. Green's discovery.

March 16th, 1906.

Yours very truly,

THOS. W. GIBSON,
Director.

Messrs. Clark, McPherson, Campbell and Jarvis,
Toronto, Ont.

10

No. 25.
Letter,
Thomas W. Gibson to J. M. Clark
22nd March, 1906.

Dear Sir,—

I beg to acknowledge receipt of your letter of the 15th inst., again enclosing the application and affidavits respecting the claim of Mr. W. J. Green on the bed of Cobalt Lake, and am instructed by the Honourable the Minister of Lands and Mines to return the same to you, and to repeat that Mr. Green's claim is not one which can be entertained.

Yours very truly,

THOS. W. GIBSON,
Director.

J. M. Clark, Esq., K.C.
16 King Street West,
Toronto.

20

RECORD.

*In the
High
Court of
Justice.*

EXHIBIT 12.

No. 1658.

\$10.00

PROVINCE OF ONTARIO.

TEMISKAMING MINING DIVISION AND COLEMAN
MINING DIVISION.

No. 26.
License to
Appellant.
7th April,
1906.

Bureau of Mines,

Haileybury, 7 Apr., 1906.

MINER'S LICENSE

Issued to The Florence Mining Co., Ltd., of Toronto, Ont., in consideration of the payment of a fee of ten dollars, under the provisions of The Mines Act, to be in force for one year from the date hereof.

GEO. T. SMITH,

For Director.

No. A175.

License 1658, April 7th, '06.

Fee \$50.00

No. 26.
Renewal of
Miner's
License to
Appellant.
6th April,
1907.

THE MINES ACT, 1906.

PROVINCE OF ONTARIO, DEPARTMENT OF LANDS,
FORESTS AND MINES.

Toronto, Ont., April 6th, 1907.

RENEWAL OF MINER'S LICENSE.

20 This Renewal of Miner's License No. 1658 issued by the Mining Recorder of Temiskaming Mining Division on the 7th day of April, 1906, to The Florence Mining Co'y, Ltd., of Toronto, Ont., called the Licensee, is issued to the Licensee in consideration of the payment of the fee of Fifty dollars, and under and subject to the provisions of The Mines Act, 1906, renews the said license until and including the 31st day of March next succeeding the date hereof and is not transferable.

THOS. W. GIBSON,

Deputy Minister of Mines.

RECORD.

*In the
High
Court of
Justice.*

No. 26.
Renewal of
Miner's
License to
Appellant.
—continued

No. 26.
Renewal of
Miner's
License to
Appellant.
1st April,
1908.

Renewal No. A597 of Old License 1658. Fee \$50.00

THE MINES ACT, 1906.

PROVINCE OF ONTARIO, DEPARTMENT OF LANDS,
FORESTS AND MINES.

Toronto, Ont., April 1st, 1908.

RENEWAL OF MINER'S LICENSE.

This Renewal of Miner's License No. 1658 issued by the Mining Recorder of Temiskaming Mining Division on the 7th day of April, 1906, to The Florence Mining Co'y, Ltd., of Toronto, Ont., called the Licensee, is issued to the Licensee in consideration of the payment of the fee of Fifty dollars, and under and subject to the provisions of The Mines Act, 1906, renews the said license until and including the 31st day of March next succeeding the date hereof and is not transferable. 10

THOS. W. GIBSON,
Deputy Minister of Mines.

RECORD.

EXHIBIT 21.

The Hon. The Minister of Lands and Mines,
Parliament Buildings,
Toronto.

Toronto, April 18th, 1906.

Dear Sir:—

Referring to my application for part of the land under the water of Cobalt Lake under the Mines Act, I beg to state that I have transferred all my rights in respect of the said location to The Florence Mining Company, Limited. Please therefore, issue the lease or patent of the said location or such part thereof or interest therein as may be allotted in respect of my application to the said Company.

Yours truly,

(Sgd.) W. J. GREEN.

*In the
High
Court of
Justice.*

No. 27.
Letter, W.
J. Green to
Minister of
Lands and
Mines.
18th April,
1906.

The Hon. The Minister of Lands, Forest and Mines,
Parliament Bldgs.,
Toronto, Ont.

January 31, 1907.

Dear Sir:—

20 We are instructed by the Florence Mining Company, Ltd., who owns J.S. 71 part of Cobalt Lake as a mining claim and the minerals thereunder, to apply either for a waiver of the performance of additional working conditions or for permission to perform such conditions. As there is an action pending in His Majesty's Courts in regard to the matter we would submit that under the circumstances the above would appear to be reasonable especially as their predecessor, Mr. W. J. Green, offered fully to perform these working conditions. We do not suppose that anything would be gained by going into a discussion at this stage of the claim of the Florence Mining Company beyond reminding you of the very strong 20 and well founded opinions of Mr. C. H. Ritchie, K.C., and Mr. H. H. Strathy, K.C., that at the time of the discovery under Cobalt Lake which is the basis of the claim of the Florence Mining Company, Cobalt Lake was in fact and in law open for exploration. If so the Company of course have a statutory claim which it is submitted cannot be taken away by the Government. In this respect we rely on the fundamental principle, "lex Angliae sine parlamento mutari non potest," which is applicable here. We contend that the law having given this claim to the Florence Mining Company the Crown is bound thereby. We would also point out that in the Fisheries case the Chief Justice of Canada showed conclusively that 30 the provisions of Magna Charter are applicable to the Province of On-

No. 27.
Letter,
Clark, Mc-
Pherson,
Campbell &
Jarvis to
Minister of
Lands,
Forests
and Mines.
31st Jan.,
1907.

RECORD.

*In the
High
Court of
Justice.*

No. 27.
Letter,
Clark, Mc-
Pherson,
Campbell &
Jarvis to
Minister of
Lands,
Forests
and Mines.
31st Jan.,
1907.

tario and we rely confidently upon its provisions "nulli vendemus nulli negabimus aut differimus rectum aut justitiam." It is quite clear that according to the very right and justice of the case to which the Courts are bound to give effect, this area belongs to the Florence Mining Company. We invoke the further provision of Magna Charter which we contend is binding upon the Government "si quis fuerit dissaisitus vel elongatus per nos sine legali judicio parium sourum, de terris castallis libertatibus, vel jure suo statim ea ei restituemus." Therefore we submit that we are entitled to ask the Government to be in a position to restore our clients' right to the twenty acres in question. We are aware, of course, that Letters Patent have been issued professing to grant land including what our clients are entitled to, but for the reasons we are submitting to the Court, there seems very little doubt that these Letters Patent are absolutely null and void and will be so declared. We are,

Yours truly,

CLARK, MCPHERSON, CAMPBELL & JARVIS.

10

No. 28.
Plan of
part of
Cobalt
Lake,
24th April,
1906.
Not printed

Plan of J.S. 71 part of Cobalt Lake.

Not printed, but tracings thereof are furnished by arrangement between the parties.

30

EXHIBIT 22.

EXHIBIT 5.

MR. T. W. GIBSON,
Deputy Minister of Lands and Mines.
Toronto.

Camp on Mud Lake,
Aug. 25th, 1906.

*In the
High
Court of
Justice.*

No. 29.
Report of
Mickle &
Robinson.
25th Aug.,
1906.

Dear Sir:—

According to instructions contained in your letters of 11th and 26th July, we have read over the papers in connection with the staking of Cobalt Lake and the road allowance and inspected the discoveries referred to. Our examination was made on the 21st July. Mr. Masten and Mr. H.

10 Dreany being present.

Four places where discovery was claimed were inspected by us. The position of these points is shown on blue print enclosed which apparently is a copy of tracing attached to papers sent us. The different points are indicated by letters in red. We do not know whether this plan is a copy of original "diagram and sketch" referred to throughout the affidavits as being filed by Mr. Bessey. We presume it is an elaboration of Mr. Bessey's diagram retaining the essential features but showing more of the surrounding claims.

The discovery at the point marked D is not shown on tracing. Two 20 small parallel seams of smaltite are shown here. They are exposed below high water mark to the spot indicated by the point of the pick held by the figure seen in photograph No. 1 attached. One of these seams extends and shows smaltite about 10 ft. above high water mark. The actual extension into the water could not be seen. The high water mark is indicated distinctly by the edge of vegetation. The trees showing on left of picture had recently fallen. At the time of our examination the water level was low.

The small seams here would constitute a valid discovery according to our standard.

30 The discovery at point marked A showed a vein of smaltite with stringers running into and visible below the surface of the water and extending back over 100 ft. being stripped and showing metal and bloom in places. Enclosed photo No. 2 shows vein, the point of the pick indicating high water level. This would constitute a discovery.

At the point marked E a veinlet of smaltite was seen below high water mark; above this level the crack extended but no metallic mineral was visible although a very little work would probably show it. This would be a discovery as to lake area.

At B the discovery claimed was a mere crack with no vein filling. It 40 was said to contain argentite but none was visible and assay of sample taken at this point of material immediately adjoining and including the crack gave no silver. This crack is almost certainly a stringer from a vein worked by owners of location R.L. 404 as a crack can be seen in their

RECORD.
 —
 In the
 High
 Court of
 Justice.
 —
 No. 29.
 Report of
 Mickle &
 Robinson.
 25th Aug.,
 1906.
 —continued

working about 20 feet distant pointing directly to discovery claimed by Bessey. We could not consider this a discovery, as neither definite vein nor valuable filling were present.

We were not asked to inspect discovery at Point C, the applicants abandoning this. Wash ore of course could not be considered.

With regard to question whether the applicants are actually the original discoverers, we may say that the vein at point A which is by far the best discovery is described in Rep. Bureau of Mines 1905, part II., p. 22, 2nd Ed., and also shown on sketch map of veins in same report. It is described under heading "veinlets at Lake Shore." An analysis of the 10 ore is given and a reference to Mr. Burrows showed that the same sent him by Prof. Miller for analysis was taken on the 1st July, 1904, and his report of analysis was made 26th July, 1904. At the time the sample was taken it was a matter of common knowledge that this veinlet existed here. In the Summary Report of Geological Survey for 1904 also in course of description of the property R.L. 401 (see pp. 202 and 205) under heading "stringers" what is evidently the vein is described and it is stated that at that time the vein had been traced 100 feet up to the hill. It is difficult to see how a thing that is already known and published in an official report can be discovered. The same report also in next paragraph 20 states that at several points along the water's edge on this location Cobalt bloom had been found. We cannot positively identify the stringers at points D and E in blue print in these reports quoted above. Of the others shown in the tracing B had no discovery and C was abandoned by applicants.

Turning to papers in connection with the matter, there seem to be a number of discrepancies. Mr. Strathy's original notice of mining claim states discovery was made 5th May and application filed 8th June and is for 38 acres more or less. Bessey's affidavit states discovery was made 5th May and application filed 8th June and is for 80 acres. Dreany's 30 affidavit corroborates Bessey's. We calculate the area of Cobalt Lake roughly at 55 acres; moreover, under the Act of 1897, 30 days were allowed in which to record and therefore, the original application of Bessey was illegal.

We do not know when Cobalt Lake was thrown open for staking. Mr. Strathy's affidavit says some time previous to 17th July, 1905. We do not see what value can be attached to Mr. Strathy's affidavit as to restaking of lake on 17th July unless he were personally present. This does not appear from his affidavit. In the Hanes case which was prior to this, affidavits of those on behalf of whom discovery was claimed were refused and 40 affidavit of discovering licensee insisted upon. There is no evidence as to restaking of lake area among papers sent us. Bessey's affidavit refers only to the road allowance staking. We remain,

Yours faithfully,

G. R. MICKLE,
 A. H. A. ROBINSON.

Veins
 running
 into water

(1) Rec. 84 Letter 16 Mar. (Dept not prepared to consider)
(2) Rec 84 " 22 Mar. affidavits return ~~not~~
(3) Rec 84 offer to prove facts. no opportunity
(4) at ~~that~~ time ⁹¹ months ev. p4
in pressure ⁹¹ months ev. p4
years " "
RECORD.

RECORD.

*In the
High
Court of
Justice.*

No. 30.
Order in
Council of
22nd Nov.,
1906.

EXHIBIT 7.

ORDER-IN-COUNCIL APPROVED BY HIS HONOUR THE LIEUTENANT GOVERNOR, THE 22ND DAY OF NOVEMBER, A.D. 1906.

The Committee of Council have under consideration the report of the Honourable the Minister of Lands, Forests and Mines, dated 22nd November, 1906, wherein he states that the claims preferred respectively by Mr. M. H. Bessey and Mr. W. J. Green for portions of the bed of Cobalt Lake have been urged by their respective representatives, and careful consideration has been given to representations made by Counsel and also to the facts and considerations connected with the respective applications and a decision was reached that the said applications were not well founded and could not on the law and facts be admitted.

The Committee therefore advise that the said applications be disallowed. **Certified,**

Certified,

“J. LONSDALE CAPREOL,”
Clerk Executive Council.

EXHIBIT 14.

20

Toronto, Canada, Nov. 26, '06.

The Hon. The Minister of Lands and Mines,
Parliament Buildings,
Toronto, Ont.

Re Cobalt Lake.

Dear Sir:

On behalf of The Florence Mining Company, Limited, which is justly entitled to the location of twenty acres under Cobalt Lake by virtue of bona fide discovery, I am instructed to protest against the proposed sale of Cobalt Lake by the Government. It is not now necessary to go into a discussion of the claim, but I desire merely to emphasize that the Company have been all along ready and willing to prove conclusively that they were justly entitled to the location on which they made a discovery.

Further, I would point out that the main value of the lake is due to the enterprise, expenditure and discovery of our clients.

I am,

Yours truly,
CLARK, MCPHERSON, CAMPBELL & JARVIS.

No. 31.
Letter,
Clark, Mc-
Pherson,
Campbell &
Jarvis to
the Hon.
The Minis-
ter of Lands
and Mines,
Nov. 26th,
1906.

NOTE by Liles says affidavits returned
R 18-L 30 Only can be by Liles says return
with a course pursued

RECORD.

*In the
High
Court of
Justice.*

No. 31.
Letter,
Thomas W.
Gibson to
Clark, Mc-
Pherson,
Campbell
& Jarvis.
29th Nov.,
1906.

Toronto, Ont., November 29th, 1906.

Gentlemen:

I beg to acknowledge receipt of your letter of the 27th instant addressed to the Honourable the Minister of Lands, Forests and Mines protesting against the proposed sale of Cobalt Lake by the Government.

Very truly yours,

THOS. W. GIBSON,

Deputy Minister of Mines.

Messrs. CLARK, MC PHERSON, CAMPBELL & JARVIS,
Barristers, etc.,
Toronto, Canada.

10

No. 32.
Caution
filed by
Appellant.
29th Nov.,
1906.

EXHIBIT 20.

LAND TITLES ACT.

THE FLORENCE MINING COMPANY, LIMITED, having its Head Office at the City of Toronto, in the County of York, has such an interest in the land hereinafter particularly described as entitles it to object to any disposition thereof being made without its consent and is entitled to notice of any application that may be made for the registration of such land.

The following is a particular description of the said land, that is to say:—

THAT part of Cobalt Lake lying west of Mining Location R.L. 404, including a small island therein as shewn on said sketch. The discovery post is 253 feet southwesterly from post Number One, which is one chain west of the southwest angle of R.L. 401. The boundary from post Number One to post Number Two follows the shore line of the said lake and is consequently irregular. From post Number Two to post Number Three is 718 feet, north astronomically. From post Number Three to post Number Four the shore line is followed. From post Number four to post Number One is 326 feet east astronomically.

30

“THE FLORENCE MINING CO. LTD.”
“H. S. Pritchard,”
President.

(Seal)

I, Harry Sidney Pritchard of the City of Toronto in the County of York, Barrister, make oath and say:—

1. I am President of the Florence Mining Company, Limited, and as such have personal knowledge of matters herein deposed to.
2. The interests of the said The Florence Mining Company, Limited, in the lands described in the annexed Caution entitles it to object to any disposition of the said lands being made without its consent and the nature of the interest of the said The Florence Mining Company, Limited, is as follows:—

10 Under an agreement for the purchase from W. J. Green of his right to a lease or Patent of the said property.

SWORN before me at the City of
Toronto in the County of York
this 29th day of December, A.D.
1906.

“H. S. PRITCHARD”

“G. C. CAMPBELL,”
A Commissioner, etc.

*In the
High
Court of
Justice.*

No. 32.
Affidavit
of H. S.
Pritchard
in support
of Caution.
29th Nov.,
1906.

RECORD.

*In the
High
Court of
Justice.*No. 33.
Letter.
Pellatt &
Pellatt to
Hon. Frank
Cochrane.
4th Jan.,
1907

EXHIBIT 15

Toronto, January 4th, 1907.

The Honourable **FRANK COCHRANE**,
 Minister of Lands and Mines,
 Parliament Buildings, Toronto.

Sir:

We have the honour to enclose herewith marked cheque for \$976,500 the balance of the purchase price of the Cobalt Lake Mining property, sold by tender, our tender for which was accepted by the Government.

We also enclose Assignment and Direction, so that the patent for this 10 property may issue to the Cobalt Lake Mining Company, Limited.

The Cobalt Lake Mining Company have already been sued by the Florence Mining Company and others claiming to be entitled to the said property and claiming that the Cobalt Lake Mining Company hold this property as trustees for them.

We purchased the property on the understanding that the Government was in a position to and would give a Crown Patent and that we would receive the lands free from all claims against them. The purchasers feel that the expense which they will now incur in defending this action or in any litigation in regard to such claims should be borne by the Crown 20 and feel that some assurance should be given that this will be the case in view of the large amount that is being paid for the property.

We have the honour to be, Sir,

Your obedient servants,

PELLATT & PELLATT.

No. 34.
Examina-
tion of
William
James
Green put
in as evi-
dence at
the trial.

EXHIBIT 19.

Examination de bene esse of William James Green printed as part of the evidence put in at the trial.

RECORD.

Exhibits to the examination of William James Green taken *de bene esse* and put in as evidence at the trial.

In the High Court of Justice.

EXHIBIT 1.

Regulations—Part printed as Exhibit 16 at the trial.

No. 35.
Revised
Regulations
handed Mr.
Green.

EXHIBIT 2.

Map—Not printed but tracings thereof supplied by arrangement between the parties.

No. 36.
Map of
Coleman
Township.

10

EXHIBIT 3.

License of William James Green—Printed as Exhibit 10 at the trial.

No. 37.
License of
W. J.
Green.

EXHIBIT 4.

Core of silver ore—Not printed.

No. 38.
Core of
silver ore.

EXHIBIT 5.

Application of William James Green—Printed as Exhibit 6 at the trial.

No. 39.
Application
of W. J.
Green.

EXHIBIT 6.

20 Receipt for purchase money—Printed as Exhibit 11 at the trial.

No. 40.
Receipt for
payment of
purchase
money.

EXHIBIT 7.

THE MINES ACT 1906.

The undersigned holder of Miners License, Number 1346, issued by the Mining Recorder of the Temiskaming Mining Division, in consideration of the sum of One Dollar (the receipt whereof is hereby acknowledged) and of other valuable consideration, doth hereby transfer to the

No. 41.
Transfer,
William
James
Green to
The Flor-
ence
Mining
Company.
11th April,
1906.

RECORD.

*In the
High
Court of
Justice.*

No. 41.
Transfer,
William
James
Green to
The Flor-
ence
Mining
Company.
11th April,
1906.

—continued

Florence Mining Company, Limited, holder of Miner's License Number 1658, issued by the Mining Recorder of the Temiskaming Mining Division, the interest of the undersigned in the Mining Claim known as J.S. 71, being part of Cobalt Lake in the Township of Coleman and in the Coleman Mining Division, particularly described as follows:

No. 41. "That part of Cobalt Lake West of Mining Location R.L. 404, including a small island therein as shown on said sketch. The discovery post is 253 feet South-westerly from post number one, which is one chain West of the Southwest angle of R.L. 401. The boundary from post number one to post number two follows the shore line of the said Lake and is consequently irregular. From post number two to post number three is 718 feet North Astronomically. From post number three to post number four the shore line is followed. From post number four to post number one is 326 feet East astronomically." 10

DATED AT TORONTO this Eleventh day of April, 1906.

Witness.

"J. J. HUBBARD,"

"W. J. GREEN." (L.S.)

RECORD.

EXHIBIT 8.

Agreement of sale William James Green to appellant—Not printed.

*In the
High
Court of
Justice.*No. 42.
Agreement
of Sale, W.
J. Green
to the
Appellant.
11th April,
1906.

PATENT OF PART OF COBALT LAKE TO RESPONDENT.

(L.S.) Wm. MORTIMER CLARK.

PROVINCE OF ONTARIO.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, KING, DEFENDER OF THE FAITH, EMPEROR OF INDIA.

No. 43.
Patent to
Respondent
15th Jan.,
1907.10 TO ALL TO WHOM THESE PRESENTS SHALL COME
GREETING:

WHEREAS Cobalt Lake Mining Company, Limited, have contracted and agreed for the absolute purchase of the lands and tenements herein-after mentioned and described at and for the price or sum of one million and eighty-five thousand dollars of lawful money of Canada, and of which lands we are seized in right of our Crown:

20 NOW KNOW YE, that in consideration of the said sum of one million and eighty-five thousand dollars, well and truly paid to our use at or before the sealing of these our Letters Patent, we have granted, and by these presents do grant, unto the said COBALT LAKE MINING COMPANY, LIMITED, in fee simple: ALL that parcel or tract of land covered with water, lying and being in the Township of Coleman, in the District of Nipissing, in the Province of Ontario, containing by admeasurement fifty-one acres, be the same more or less, which said parcel or tract of land covered with water may be otherwise known as follows, that is to say: Being composed of Cobalt Lake Mining Location, being land covered with the water of part of Cobalt Lake, together with the mines, minerals, and mining rights thereon and thereunder, situate in the said Township of Coleman, described as follows: Being all that part of the land covered with the water of Cobalt 30 Lake lying southerly, easterly, and south-easterly of the south-easterly limit of the right-of-way and Cobalt Station grounds of the Temiskaming and Northern Ontario Railway, excepting nevertheless that portion of land covered with water of said Lake designated as Mining Location J. S. 55 containing four acres, more or less, granted by Letters Patent dated thirty-first

RECORD.

In the
High
Court of
Justice.

No. 43.
Patent to
Respondent
—continued

**Respondent
—continued**

July, nineteen hundred and five, to James H. McKinley, Ernest J. Darragh, Robert Gorman, and William Anderson, the said part granted by these Letters Patent being shown tinted red on Plan of Survey by Ontario Land Surveyor J. F. Whitson, dated December fifth, nineteen hundred and six of record in the Department of Lands, Forests, and Mines, a triplicate of which plan is attached to and forms part of these Letters Patent, saving, excepting, and reserving nevertheless, unto us, our heirs and successors, the free use, passage, and enjoyment of, in, over, and upon all navigable waters which shall or may hereafter be found on or under or be flowing through or upon any part of the said parcel or tract of land covered with water hereby granted as aforesaid, and reserving also right of access to the shores of all rivers, streams, and lakes for all vessels, boats, and persons, together with the right to use so much of the banks therof not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes, subject to the provisions of Sections 188 to 221, inclusive, of the Mines Act, 1906.

GIVEN under the Great Seal of of our Province.

WITNESS: His Honor William Mortimer Clark, etc., etc.,
Lieutenant-Governor of our Province of Ontario.

At our Government House, in our City of Toronto, this fifteenth day of 20 January, in the year of our Lord one thousand nine hundred and seven, and in the sixth year of our Reign.

BY COMMAND of the Lieutenant-Governor-in-Council.

"W. J. HANNA,"

"W. G. R."

“T. W. G.”

Secretary.

"F. COCHRANE,"

Minister of Lands, Forests,

and Mines.

Recorded the 17th day of January, A.D. 1907.

Ref. No. 53003

Sale No. 54374

Date of Sale,

9 Jany., 1907.

C. L. S.

“JOHN F. C. USHER.”

JOHN F. G. OSSHER,
Deputy Provincial Registrar. 30

30

RECORD.

*In the
High
Court of
Justice.*

THE FLORENCE MINING COMPANY, LIMITED,

PLAINTIFFS,

AND

THE COBALT LAKE MINING COMPANY, LIMITED,

DEFENDANTS.

—
No. 44.
Reasons for
Judgment
of Hon. Mr
Justice
Riddell.
June 15,
1908.

J. M. Clark, K.C., S. H. Bradford, K.C., and R. U. McPherson, for Plaintiff.

E. D. Armour, K.C. and G. F. Henderson, K.C., and Britton Osler, for Defendants.

10

June 15, 1908.

Reasons for Judgment by the Hon. Mr. Justice Riddell:—

In January, 1906, one Green, who had had some experience in mining law and was a solicitor, was contemplating the formation of a Syndicate to prospect in the Cobalt District. He communicated with Major Gordon, who was located at the time in Cobalt, and arranged that a diamond drill should be set to work in Cobalt Lake on the ice, under the supervision of Gordon for Green and his associates, who seem to have formed themselves into a syndicate. Green went to the proper office at the Parliament Buildings and procured such information as satisfied him that Cobalt Lake was open for prospecting, and I see no reason for doubting the good faith of Green, or of any of those through whom the plaintiffs claim. Neither Green nor Gordon had a miner's license when the drill was started to work; but Gordon, finding indications that a valuable discovery might be made by means of the drill, sent for Green, and on March 7th Green came from Haileybury with the licenses for himself and Gordon; and thereupon and thereafter the drill was drawn and found to have pierced a valuable silver vein. A survey was at once had, and staking after a fashion made. I do not set out the particulars, as these are fully shown in the evidence of Gordon. Gordon's evidence should be given full credence throughout; and if it is necessary to consider the staking, the facts will not be in dispute. In the view I take of the law in the case, all this is immaterial.

RECORD.

*In the
High
Court of
Justice.*

No. 44.
Reasons for
Judgment
of Hon. Mr
Justice
Riddell.
June 15,
1908.
—continued

An application was made for filing and recording the claim, but the Inspector (Recorder) refused to record it, as the Lake had been, he said, withdrawn and was not open for prospecting. Every effort was made by the discoverers and their assignees, the plaintiffs, to procure the land claimed (which was the land under the major part of Cobalt Lake), but without avail.

Cobalt Lake is in the Township of Coleman, which was in the Temiskaming mining division (established by O. C., 15 April, 1905). On the 28th August, 1905, such parts of the Township of Coleman (with other lands) as had not theretofore been disposed of were, under Sec. 33, of R. S. O., C. 36, 10 withdrawn from sale or lease; but an O. in C. approved the 30th October, 1905, authorized the Inspector (Recorder) of the mining division to record mining claims situated in the said Township (and elsewhere) under the amended regulations for mining divisions upon certain conditions. This O. C. detached the Township of Coleman from the Temiskaming Mining Division, and made it a separate M. D. under the name and title of the Coleman M. D., with the same Inspector (Recorder) and head office as the Temiskaming Mining Division.

It is plain that the Inspector considered that Cobalt Lake was not open for prospecting, and that the same opinion was shared by the officers of the 20 Department, including the Minister. Upon the Department being applied to by Green, his solicitors were informed that his application could not be considered.

At the trial I refused to compel the Minister to state the grounds of the position taken by him and his department. I considered that the Court has, in a record like this, no concern with the reasons actuating a Minister of the Crown in a matter of public policy. All legitimate means were employed by the plaintiffs to have what they claimed as their rights granted to them; but their efforts were ineffective. The plaintiffs are the assignees of Green.

Against the protest of the plaintiffs the Crown sold in fee simple the bed of the Lake, including all mineral rights, etc., etc., for a very large sum to the defendants, without any discovery made by or for them, and a grant was made accordingly, January, 1907. The defendants, of course, had full notice and knowledge of the claim of the plaintiff.

I refused at the trial to compel the Minister to say why this sale was made as it was, or why the plaintiffs did not receive a patent. In my view the advisers of His Majesty are not responsible to the Court for the reasons of their official acts or advice. They are responsible to the Legislature and to the representative of His Majesty, and in the last resort to the 40 people; but the Court has no right on such a record as this to ask or to consider the motives actuating any Minister of the Crown.

In 1906 an Act was passed, 6 Edw. VII., C. 12, confirming the O. in C. of the 14th of August, and declaring it "to have been and now to be binding and effectual for the purposes therein mentioned." And after the grant to

the defendants another Act was passed, 7 Edw. VII., c. 15, which after reciting the sale (inter. alia) of Cobalt Lake "and the lands covered by the same, together with all mineral rights thereon and thereunder," and the desirability of confirming the title of the purchasers, expressly enacted that the sale of Cobalt Lake "and the lands covered by waters of the same with the mineral rights and the patents therefor are hereby confirmed and the fee absolute in the said lands and in all the mines and minerals being and lying in or under the said lands and all mining rights therein and thereto, are declared to be vested in the said purchasers respectively, as and from the date 10 of the said sales absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location, or staking." The second section provides that "all discoveries and claims, if any, made or arising prior to such sales shall be dealt with by the Lieutenant-Governor-in-Council as he may think fit."

This action was begun the 26th December 1906. It claims that the patent to the defendants issued erroneously and should be set aside; that the rights of the defendants are subject to the rights of the plaintiffs and consequential relief. The defendants say that Cobalt Lake was not open for discovery; that Green did not observe the provisions of the Mines Act, 20 and that the patent to the defendants is valid. They also plead that the Attorney-General is a necessary party, and that they are purchasers for value. It is a matter of public notoriety that the plaintiffs endeavored to have the Act of 1907 disallowed by the Dominion authorities and failed.

It is also not denied that the Acts of 1906 and 1907 were "Government measures," and were intended to bar the claim of the plaintiffs.

A very careful and able argument was submitted by counsel for the plaintiffs, but I am unable to find any grounds upon which they are entitled to recover.

The many difficult questions arising in respect of the interpretation of 30 the R. S. O., 36, the right of the discoveries to prospect at all, and the effect of what they did, the possibility of such an action as this being sustained in the absence of the Attorney-General, etc., I do not pass upon.

This is a matter of property and civil rights; by the B. N. A. Act this is wholly within the jurisdiction of the Legislature of the Province; in matters within their jurisdiction, the Legislature have the same powers as Parliament, and the power . . . of Parliament is so transcendent and absolute, that it cannot be confirmed, either for causes or persons within any bounds . . . It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and 40 expounding of laws concerning matters of all possible determinations. Blackstone, *Commentaries* 1 p., 160 . . . "Within the jurisdiction given the Legislature of the Province no power can interfere with the Legislature, except, of course, the Dominion authorities, which interference may occasion disallowance. There is no need of speaking of the paramount power of the Imperial Parliament."

RECORD.

*In the
High
Court of
Justice.*

No. 44.
Reasons for
Judgment
of Hon. Mr.
Justice
Riddell.
June 15,
1908.
—*continued*

RECORD.

*In the
High
Court of
Justice.*

No. 44.
Reasons for
Judgment
of Hon. M.
Justice
Riddell.
June 15,
1908.

—continued

In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition, "Thou shalt not steal," has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States.

I cannot read sec. 1 of the Act of 1907 as meaning anything less than that the plaintiffs are not to have any rights in the property, and this is made more clear, if possible, by sec. 2, which provides that all such claims as this shall be dealt with by the Lieutenant-Governor-in-Council as he may think fit.

It seems to me the only recourse for the plaintiffs is to appeal for consideration to the Lieutenant-Governor-in-Council, with the manner in which such an appeal should be dealt with, the Court has nothing to do.

The action must be dismissed with costs, limited to the costs incurred from and after the 20th of April, 1907, the day of the date of the Act of Edw. VII. coming into force.

Thirty days' stay.

RECORD.

IN THE HIGH COURT OF JUSTICE.

*In the
High
Court of
Justice.*

The Honourable Mr. Justice Riddell:

No. 45.
Formal
Judgment
at Trial.

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,
PLAINTIFFS,
ANDTHE COBALT LAKE MINING COMPANY, LIMITED,
DEFENDANTS.

10

L. S.
\$1.60

Monday, the 15th day of June, 1908.

1. This action having come on for trial on the 9th, 10th, and 11th days of June, 1908, before this Court at the Sittings holden at the City of Toronto for the trial of actions without a jury, in the presence of counsel for the plaintiffs and defendants, and also for the Honourable the Attorney-General for Ontario, who was duly notified under the provisions of S. 60 of the Judicature Act, no one appearing for the Honourable the Minister of Justice of Canada, although also duly notified under the said Act, upon hearing read the pleadings, and upon hearing the evidence adduced and what was alleged by counsel aforesaid: THIS COURT WAS PLEASED TO DIRECT that this action should stand over for judgment, and the same coming on this day for judgment:

2. THIS COURT DOTH ORDER AND ADJUDGE that the said action be and the same is hereby dismissed.

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the plaintiffs do pay to the defendants their costs of this action incurred subsequently to the 20th day of April, 1907, forthwith after 30 taxation thereof.

4. AND save as aforesaid this Court doth not see fit to make any order as to costs.

GEO. S. HOLMSTEAD,
Registrar.

Judgment signed this 24th day of September, 1908.

M. B. JACKSON,
Clerk of C. and P.
Entd. 24-9-08.
J. B. 10, page 108,
R. S. K.

RECORD.

*In the
High
Court of
Justice.*No. 46.
Order
Allowing
Appeal
Direct to
the Court
of Appeal.

IN THE HIGH COURT OF JUSTICE.

The Honourable The Chief Justice of Ontario:

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,

PLAINTIFFS,

AND

THE COBALT LAKE MINING COMPANY (LIMITED),

DEFENDANTS. 10

L. S.
50 cts.

Thursday, the 5th day of Nov., 1908.

UPON the application of the Plaintiffs; upon reading the Consent of the Solicitor for the Defendants filed, and upon hearing what was alleged on behalf of the applicant, and it appearing that this case is one in which an appeal would lie from the judgment of this Court to the Supreme Court of Canada; and the parties consenting to this order:

1. IT IS ORDERED that the Plaintiffs may discontinue the pending 20 appeal herein to the Divisional Court of the High Court of Justice from the judgment of the Honourable Mr. Justice Riddell pronounced herein on the Fifteenth day of June, 1908, and may appeal direct to this Court from said judgment, the rights of the parties for the purposes of such appeal to this Court to be in all respects as if the said judgment had been delivered on the Twenty-first day of October, 1908.

2. IT IS FURTHER ORDERED that the time for appealing to this Court be extended until the First day of December next, both parties to expedite the preparation of the case, and the printing of the Appeal Books so as to have the case brought on for hearing at the January Sittings without 30 any unnecessary delay.

3. IT IS FURTHER ORDERED that the costs so far incurred in the pending appeal to the Divisional Court and the costs of this application be costs in the cause as part of the costs of the appeal to this Court.

Entered O. B. XI.
Issued 16th Nov., '08.

N. F. PATERSON,
Registrar C. A.

RECORD.

*In the
High
Court of
Justice.*

IN THE COURT OF APPEAL FOR ONTARIO.

BEFORE THE HONOURABLE
THE CHIEF JUSTICE OF ONTARIO, }
IN CHAMBERS. } Friday, the 8th day of Janu-
ary, A.D. 1909.

—
No. 47.
Order of
the Chief
Justice of
Ontario of
8th Jan.,
1909, Dis-
pensing
with the
Printing of
Maps.

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,
(Appellant) PLAINTIFF;

AND

THE COBALT LAKE MINING COMPANY, LIMITED,
(Respondent) DEFENDANT.

Upon the application of the appellant upon reading the consent of the solicitor for the respondent filed and upon hearing what was alleged on behalf of the appellant:

IT IS ORDERED that upon the appellant furnishing to this Court for the use of the judges five white prints of each of the three maps forming part of the exhibits numbered five, six and twenty-two at the trial 20 and five copies of the map marked "Exhibit 2" to the examination of William James Green, taken *de bene esse*, the printing of all the maps referred to in the evidence be and the same is hereby dispensed with.

The originals to be produced for reference if necessary upon the argument of the appeal.

Entered O.B. XI.
Issued 9th Jan'y, '09.
N.F.P.

N. F. PATERSON,
Registrar C.A.

RECORD.

*In the
High
Court of
Justice.*No. 48.
Reasons of
Appeal.

IN THE COURT OF APPEAL FOR ONTARIO.

BETWEEN :

THE FLORENCE MINING COMPANY (LIMITED)
(Appellant) PLAINTIFF;

AND

THE COBALT LAKE MINING COMPANY (LIMITED)
(Respondent) DEFENDANT.

REASONS OF APPEAL.

10

1. The judgment was contrary to the evidence and the weight of evidence and should have been entered for the plaintiff.
2. Upon the facts established at the trial the appellant had acquired a vested right in the twenty acres of the bed of Cobalt Lake claimed herein and in the adjoining road allowance.
3. The Trial Judge has found that the licensee through whom the appellant claims discovered a valuable silver vein. This mineral was in place within the meaning of the Mines Act and the Trial Judge expressly found that Cobalt Lake is in the Township of Coleman from which it follows that the licensee through whom the appellant claims discovered a 20 valuable vein of ore in place within Coleman Mining Division mentioned in his license. He thereupon acquired the right to mark or stake out and he marked or staked out a mining claim (being the claim in question herein) under Section 47 of Chapter 36 of the Revised Statutes of Ontario 1897 and the regulations at the time of discovery then in force.
4. The discovery was made on Crown Lands not withdrawn from location or exploration and not included in any claim occupied by another licensee or on lands the mines, minerals or mining rights of which had been reserved by the Crown.
5. The said Statute expressly provided that the licensee should have 30 the right to work the mining claim or to transfer his interest therein to another licensee and he did duly transfer the said mining claim to the appellant herein.
6. The conditions were fully complied with and the appellant upon such transfer to it became the owner of the property claimed herein as a mining claim.

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*In the
High
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Justice.*

No. 48.

Reasons of
Appeal.*—continued*

7. The right acquired by the appellant by virtue of discovery as found was property. The nature of this property so acquired by the appellant is sufficiently indicated by Lindley, L. J. in *Sutherland v. Heathcote* (1892) 1 Ch. 475 at p. 483.

The Statutory right of the appellant is an incorporeal hereditament lying in grant. On this point the appellant also refers to *Wickham v. Hamlin* (1840) 7 M. & W. 78.

8. The learned Trial Judge's view was that the two Statutes herein-after discussed were intended to bar the claim of the appellant and that 10 "the prohibition 'Thou shalt not steal' has no legal force upon the sovereign body" meaning that the Ontario Legislature is omnipotent.

9. Apart from the effect of the said Statutes which will be subsequently considered it is submitted that the alleged patent to the respondent is null and void.

As the foundation of title to a mining claim, a discovery of mineral in place was necessary under the law at the time in force.

The learned Trial Judge expressly found that no discovery was made by or for the respondent.

Upon this finding under the law as it then stood the patent to the 20 respondents was null and void.

10. It was expressly found by the Trial Judge that the respondent took with full notice and knowledge of the claim of the appellant.

11. There was no statutory authority to grant the patent to the respondent without discovery and the Minister of Mines had no power to allow the patent to issue except under statutory authority. *Reynolds v. Attorney-General* (1896) A.C. 240 per Lord Morris at page 243.

12. The lands in question were contained in a mining division and R.S.O. (1897) Chapter 36, Section 10, ss. 1, provided that the Crown Lands not situated in a mining division may be leased or sold and by ss. 2 30 provided that where such Crown Lands are situated within a mining division they may be occupied or worked as mining claims.

13. The patent professed to grant the rights of the Crown in the property in question but as the Crown had no rights the property being already vested in the appellant nothing passed by the patent.

14. In Chitty "On Prerogatives of the Crown," page 331, it is said "If a Crown grant prejudices or affects the rights of third persons the King is by law bound on proper petition to him to allow a subject to use his royal name to appeal it on a scire facias and it is said in such a case the party may upon enrollment of the grant in Chancery have a scire facias 40 to repeal it."

This statement of the law was quoted with approval by Strong, J., in *Farmer v. Livingstone*, 8 S.C.R. 140 at page 152, where he shews that the statutory remedy now effects the same purpose.

15. The objection urged by the respondent that the action could not

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Court of
Justice.

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Appeal.

—continued

be maintained without the fiat of the Attorney-General was based upon the judgment of Teetzel, J., in *Farrah v. Glen Lake Mining Company*, which has been overruled by this Court and it is settled that such an action may be maintained by the appellant without obtaining the Attorney-General's fiat or his consent in any other form. *Farrah v. Glen Lake Mining Co.* (1908) 17 O.L.R. 1.

16. In the case of *Ontario v. Seybold*, (1903), A.C. 73, heard by the Judicial Committee of the Privy Council on another point Sir John Boyd, the Chancellor of Ontario, set aside Dominion patents although the Attorney-General had not given his fiat or consent in any form. 10

17. The Order-in-Council of 14th August, 1905, was not as required by the regulations posted up in the Recorder's office at the time of Mr. Green's discovery. 20

18. Mr. Smith, the Mining Recorder, stated in the course of his evidence that until a week before the trial he thought the Order-in-Council of 14th August, 1905, had been posted up in his office at the time of the discovery under which the appellant claims but at the trial admitted he was in error and it was not so posted up at that time and that it had not been posted up at any time in his new office into which he moved in the previous November. 20

19. The patent to the respondent was issued erroneously by mistake and improvidently. 20

20. As to 6 Edward VII., Chapter 12, the appellant submits that it does not affect the rights of the appellant. The Statute being retrospective should be strictly construed and is given full force and effect by holding that the Order-in-Council of the 14th of August, 1905, was in force from the said 14th August, 1905, until Cobalt Lake was thrown open for exploration by the subsequent Order-in-Council of the 30th October, 1905. Further, the said Statute refers to a discovery or discoveries alleged to have been made on such lands at or before the passing of such Order-in-Council, that is on the 14th day of August, 1905. 30

21. The appellant submits that the Statute (1907) 7 Edward VII., Chapter 15, not having been pleaded is not available as a defence and further that it is in the nature of a private Act.

This Act deals only with a small piece of land less than one hundred acres in extent and has all the indicia of a private Act and it would none the less be a private Act even if it contained a clause declaring it to be a public Act.

Brett v. Beale (1829), 1 Moody & M. 416 at p. 425 cited in 10 S.C.R. 563, *Ritchie, C.J.*, at p. 582. 40

Dewson v. Pavor (1844) 5 Hare 415.

Re Goodhue (1872) 19 Grant 366.

Corporation City of Quebec v. Quebec Railway Co. (1884) 10 S.C.R. 563 at p. 582.

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22. This legislation being in the nature of a private Act cannot affect the appellant's rights.

Sub-section 58 of Section 8 of the Ontario Interpretation Act speaking of an Act of the Legislature provides "Nor if the Act be in the nature of a private Act shall it affect the rights of any person or body politic corporate or collegiate such only excepted as are therein mentioned or referred to."

23. The proper construction to be put upon the second of the said Acts, that is 7 Edward VII., Chapter 15, is that the Act was dealing with such part of Kerr Lake and Cobalt Lake as was then vested in the Crown and as to which no claim had yet been raised, but to which claims might be subsequently raised. The language of the Statute is "It is desirable that no question should be raised." This is apt language when speaking of claims that may arise. It can have no application to the questions in this action, which had been raised long before this Act was passed, the present action having before then been at issue and set down for trial. This view is confirmed by the last clause of the Statute, which provides that notwithstanding anything contained in the Statute "claims made or arising prior to the sales" should not be affected by it. It follows, therefore, that the appellant's claim in this action is untouched by the Statute.

This is in accordance with natural justice and equity and merely means that the purchasers took their title subject to any prior claims which had been made before the Statute was passed, but free from those which might arise subsequent to the sales based on the ground that the Executive had exceeded its powers in attempting to sell and convey the lands without any legislative sanction, or on other grounds. All this means is that the purchasers took their rights subject to claims of which they had notice, as they had of the appellant's claim, and free from claims of which they had no notice.

24. The said Acts profess only to confirm the rights given by the said patent but as the patent could give only any rights the Crown had when it was issued neither it nor the legislation could affect rights which were vested in the appellant before the said patent issued.

25. The legislation in question does not necessarily apply to the appellant. The appellant claims to be entitled to only part of the property under Cobalt Lake and even if the legislation in question is held to be constitutional it can be given due effect by limiting its operation to that part of the lake in which the appellant has no rights but which was then vested in the Crown.

26. Unless they must do so by the clear and compelling language used the Courts will not hold that private property is intended to be confiscated by an enactment unless adequate compensation is expressly given for the rights which are taken away. The language here is not sufficient and no compensation is provided. The provision for an appeal to the bounty of an executive that would rush this legislation through its three readings

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Court of
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Reasons of
Appeal.
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RECORD. in one day by its chance majority is no real provision for compensation but is wholly illusory.

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Court of
Justice.

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Reasons of
Appeal.

—continued

Metropolitan District Asylum v. Hill (1880) 5 A.C. 582.

Trimble v. Hill (1879) 5 A.C. 342.

26. The appellant submits that the said legislation which an eminent judge has called "legislative robbery" is ultra vires of the Ontario Legislature.

27. When the Imperial Parliament assigned to the Dominion and the Provinces their respective powers and functions the power of appointing the judges and therewith the consequent control and authority over litigation during its progress in the Courts was assigned to the Dominion. 10

28. The appellant submits that the British North America Act having recited that the Dominion of Canada should be federally united with a constitution similar in principle to that of the United Kingdom embodied as part of the Canadian constitution the fundamental principles of British jurisprudence and particularly the provisions of Magna Charta and that the Ontario Legislature is bound thereby.

29. The appellant submits that the said legislation of the Ontario Legislature in question having been passed in violation of the constitutional safeguards that prevent private property from being taken without due process of law and declare that justice should not be sold, denied, or delayed and the other fundamental principles of the British constitution was not authorized by the British North America Act and is ultra vires and wholly void. 20

30. The said Statutes are not legislative Acts within the authority granted to Provincial Legislatures, but being attempts at arbitrary decrees contrary to the law of God and to the provisions of the Great Charter hereinbefore referred to and to other safeguards of private rights, are unwarranted and ultra vires of the Provincial Legislature.

31. The action of the appellant was brought before the said Act last 30 mentioned was passed by the Legislature and was actually set down for trial. The appellant was entitled to a trial thereof by a Judge appointed by the Governor-General-in-Council under the provisions of the British North America Act in that behalf, and it was not competent for the Legislature to usurp the functions of the Courts by enacting the legislation in question. If it could be validly done in this case every dispute might be so judged, not by a Judge constitutionally appointed by the Dominion, but by the majority of the Legislature.

32. In re Hamilton and North-Western Railway (1876), 39 Upper Canada Queen's Bench, 93, Chief Justice Harrison, says at page 112: "In 40 the reading of the British North America Act one cannot fail to observe the distribution of powers into three great divisions of executive, legislative and judicial."

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33. The British North America Act gives the Provincial Legislature power to make laws regarding property and civil rights.

This does not give them the right to confiscate property and civil rights. Confiscation is not legislation. Is it conceivable that a Provincial Executive has power to confiscate all the private property in a Province and sell it or otherwise deal with it as it might choose if a subservient majority in the Legislature condones it, and if there is not power to confiscate all there cannot be power to confiscate any?

10 34. Confiscation is beyond the power of a Provincial Legislature. Lord Watson in *Dobie v. Temporalities Board* (1881), 7 A.C. 136, at p. 151, says "that the Quebec Legislature shall have the power also to confiscate these funds (property in the Province of Quebec) or part of them is a proposition for which no warrant is to be found in the Act of 1867.

35. This contention is supported by *The Fisheries Case* (1898), A.C. 713, in which Lord Herschel says: "If the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by Sec. 91."

It is submitted that the same canon of construction applies to section 92.

20 36. What was attempted by this legislation is not a legislative Act.

36. It is submitted that it is not the function or within the power of the Local Legislature to pass a Statute for the purpose of confiscation of property without compensation. Such a statute is not an exercise of the power of making laws.

In re Hamilton and North-Western Railway Co. (1876), 39 Upper Canada Queen's Bench, 93, Chief Justice Harrison, says at page 111: "The functions proper of a legislative body are to make laws for the government of the people."

37. The appellant's claim having been in suit before the legislation in question was passed, their right to have it decided by the Courts is not taken away.

In re the Will of Wi Matua (1908), A. C. 448.

38. The case of Caldwell and Fraser is authority for the appellant as to the law and practice of the Department of Mines in granting property of the nature and form claimed by the appellant.

This case is referred to in the judgment of Sir John Boyd, Chancellor of Ontario in *Ontario Mining Co. v. Seybold* (1899), 31 Ontario Reports 386, at p. 400.

40 39. The learned Judge cites the action of the Governor-General-in-Council in regard to disallowance in support of his conclusion. The decision of the Governor-General-in-Council was expressed in the following words: "The legislation in question, even though confiscation of property without compensation, and so an abuse of legislative power, does not fall within any

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—continued

of the aforesaid enumeration. For these reasons the undersigned, although compelled to report to Your Excellency strong disapproval of the policy of the statute, recommends that it be not disallowed, but be left to such operation as may lawfully be given to it."

It is submitted that these words cannot be construed as expressing any acquiescence by the Federal authorities in the constitutional validity of the legislation in question.

40. The British North America Act provides regular means for raising Provincial revenues, and does not authorize the Provincial Governments to confiscate private property, sell the same, and appropriate the proceeds. 10

41. If it had been intended to confer on the Provincial Legislatures such extraordinary power as (a) to confiscate private property without compensation; (b) to interfere with the due process of law; (c) to usurp the judicial functions of the Courts; (d) to deprive British subjects in the Provinces of their constitutional right to justice, such intention would have been expressed in clear and unmistakable language.

42. The decision in McGregor v. Esquimalt & Nanaimo Railway Company (1907), A. C. 462, relied on by the respondent is distinguishable because, (a) in that case there was not, as here, an action actually set down for trial before the legislation was introduced; (b) the purpose and object of the British Columbia legislation was not to confiscate private property without compensation, but to deal with and settle a large question of Provincial policy, in regard to settlement; (c) there was not in that case, as here, an usurpation of judicial power and authority. 20

43. The appellant relies also on the reasons appearing in the pleadings, evidence and exhibits herein.

J. M. CLARK,
S. H. BRADFORD,
R. U. MCPHERSON,
of Counsel for Appellant. 30

IN THE COURT OF APPEAL FOR ONTARIO.

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,
 (Appellants) PLAINTIFFS,
 AND

THE COBALT LAKE MINING COMPANY, LIMITED,
 (Respondents) DEFENDANTS.

RECORD.

*In the
 High
 Court of
 Justice.*

No. 49.
 Reasons
 Against
 Appeal.

REASONS AGAINST APPEAL.

The respondents submit that the judgment appealed from should be affirmed for the following among other reasons:

1. The plaintiffs claim as assignee of William James Green whom they allege to have duly staked a mining claim covering part of the lands sold by the Province of Ontario to the defendants.
2. At the trial of this action the learned trial Judge did not call upon counsel for the respondents, and the respondents submit that the learned trial Judge erred in many places in his judgment as to the validity of the plaintiffs' claim apart from the confirming statutes on account of having decided without hearing the argument of counsel for the respondents.
3. The evidence of Green taken *de bene esse* shows that even if Cobalt Lake was open for exploration and prospecting he failed to comply with the statutes and regulations governing the staking of mining claims and that the mining claim in dispute herein was not properly staked by him, that the alleged claim did not conform to the provisions of The Mines Act, and that the said Green did not make a discovery within the meaning of the Act, and the respondents submit that the learned trial Judge erred in holding that the facts with regard to the staking could not be in dispute. In any event there were three claims prior to that of Green's for alleged discovery at the place in question.
4. The appellant and its predecessor in title, Green, failed to comply with the provisions of the Act and regulations in that behalf subsequent to the alleged staking, and upon the refusal to record the same failed to exhaust the remedies open in the premises, and cannot now be heard to allege that it was prevented from taking these actions by reason of the ruling of the Department, and refusal to record referred to in its reasons for appeal.
5. In any event the staking by the said Green, even if properly carried out under the provisions of the statute and the regulations, would not

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have vested any right in him, because the land was land at the bottom of a lake, and because, in any event the lands, if the subject of exploration, were withdrawn from exploration by Order-in-Council dated the 14th of August, 1905, which Order-in-Council was duly posted up in the office of the Recorder and remained so posted till some time in November of the same year, thereby complying with the regulations in that behalf.

6. The respondents submit that the said Order-in-Council of the 14th of August remained in full force and effect at the date of the alleged discovery and staking by the said Green. The Order-in-Council of the 28th of August withdrawing the Township of Coleman and the Order of the 30th of October opening the Township of Coleman and providing for certain mining regulations, must of necessity be read together, and clearly affected only that portion of the Township of Coleman opened for occupation prior to the passing of the Order-in-Council of the 28th of August.

7. The said Order-in-Council of the 14th August, 1905, was by an Act, 6 Edward VII., Chapter 12, declared to be in force at the passing of the Act and to have been always in force from the date thereof.

8. The respondent Company purchased the land under the waters of Cobalt Lake on or about the 21st December, 1906, by tender accepted on 20 the same day by His Majesty's Government, paying on the said date ten per cent. of the price of the said lands, amounting to \$108,500 and contracting to pay the balance on or before the 4th day of January, 1907. On the said 21st day of December, 1906, no notice of the claim of the appellant has been shown to have reached the respondents, but the evidence at the trial shows that the first notice of the claim of the appellant was in the form of a letter to the respondents, received by them on the 29th day of December, on which day the appellants first registered a caution against the lands in the Land Titles Office.

9. The File of the Department shows that the claim of the appellant 30 was based on the allegation that the Lake was open for exploration at the date of their discovery in March, 1906, and the respondents even had such claim come to their knowledge would have been entitled to rely on the Act 6 Edward VII., Chapter 12, which Act, so far as they were aware, had not been attacked but had been acquiesced in by the appellants.

10. There is no evidence that the Patent to the respondents was issued erroneously or by mistake and improvidently. The Crown had inherently the right to sell a part of its domain and the patent is valid in any event.

11. An Act, 7 Edward VII., Chapter 15, was passed confirming the patent to the respondents and there is no evidence that this Act is in the 40 nature of a Private Act. This Act provides for compensation as therein set out, and merely substitutes the question as to the right to compensation for that of the right to Crown Land which has always been the subject of jurisdiction by the Crown through its Department of Crown Lands in the Province.

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12. The Acts above referred to, namely 6 Edward VII., Chapter 12, and 7 Edward VII., Chapter 15, are not ultra vires but are within the powers of the legislature of the Province of Ontario and though petitions were lodged with the Governor-General in Council to disallow the same they were after due consideration allowed to stand and no action was taken by the Governor-General in Council.

13. There is no confiscation of the property and this case therefore does not fall within the cases cited by the appellants in the Reasons of Appeal herein.

10 14. The respondents further submit that this action is not properly constituted without the Attorney-General being added as a party.

E. D. ARMOUR,

BRITTON OSLER,

of Counsel for the Respondents.

FLORENCE MINING CO. v. COBALT LAKE MINING CO.

Reasons for Judgment of Court of Appeal for Ontario.

Copy of Judgment of Court of Appeal Delivered April 5th, 1909.

RECORD.

*In the
Court of
Appeal for
Ontario.*

No. 50.
Reasons for
Judgment
or Court of
Appeal for
Ontario.
Moss,
C.J.O.

MOSS, C.J.O.—The first matter for consideration on this appeal is the constitution and frame of the action and the nature and extent of the relief which, assuming them to be entitled to any, the plaintiffs can be awarded on the present record.

By letters patent under the Great Seal of the Province, dated 15th January, 1907, the Crown, in consideration of the payment of \$1,085,000, granted to the defendants in fee a parcel of land covered with water situated in the township of Coleman, containing 55 acres, more or less, described as being composed of Cobalt Lake mining location, being land covered with the water of part of Cobalt Lake, together with the mines, minerals and mining rights thereon and thereunder, and being all that part of the land covered with the water of Cobalt Lake lying southerly, easterly, and southwesterly of the southeasterly limit of the right of way and Cobalt station grounds of the Temiskaming and Northern Ontario Railway, excepting that portion of land covered with water of the lake designated as mining location J. S. 55, containing 4 acres, more or less, granted by letters patent dated 31st July, 1905, to certain named persons. 20

The plaintiffs, claiming as the assignees of one W. J. Green, allege that on 7th March, 1906, the said Green, while engaged in explorations under the waters of the lake, made a discovery of valuable ore or mineral in place under part of the lake, and thereupon staked out a mining claim in accordance with the Mining Act, embracing 20 acres or thereabouts of the lands covered with the waters of the lake, thereby becoming, as they allege, entitled to the said mining claim and the minerals thereunder, and afterwards and within due time sought to procure the due filing of the claim in the office of the recorder of mining claims in the proper mining district, but he was unsuccessful, owing to the refusal of the recorder to receive and record his claim and the refusal of the Bureau of Mines or the Minister of the Department to entertain or consider his claim; that, notwithstanding the existence of the said claim, the Crown assumed to sell and grant to the defendants the lands described in the letters patent, 30

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—continued

including therein the portion embraced in the said mining claim; that such sale was without any legislative authority and the letters patent were issued erroneously and by mistake and improvidently and that, notwithstanding the said sale and issue of Letters Patent, the plaintiffs are entitled to the parcel of land described in the claim of the said W. J. Green.

The plaintiffs claim (1) a declaration that the Letters Patent were issued erroneously, by mistake and improvidently, and are utterly void as against the plaintiffs, and that the plaintiffs are entitled to the lands and minerals; (2) a declaration that the defendants' rights, if any, under the 10 Letters Patent, are subject to the plaintiffs' said rights; (3) an injunction restraining the defendants, their servants, workmen, or agents, from extracting or removing ore or minerals from the claim or interfering with the plaintiffs' exclusive right of possession; (4) an account of all ore or minerals that may be extracted or removed from the claim; (5) a judgment setting aside as ultra vires and void the Letters Patent in favor of the defendants as against the plaintiffs, or in the alternative confining the operation thereof to the lands therein described other than those claimed by the plaintiffs; (6) costs; (7) further and other relief.

The Crown is not a party to the action. True, the Attorney-General 20 was represented at the trial and on the argument of the appeal, but that was by reason of a notice under the Judicature Act (sec. 60) because of the plaintiffs having called into question the constitutional validity of certain Acts of the Legislature, to which further reference will be made.

The presence of the Attorney-General or his representative under this provision does not, of course, enlarge the jurisdiction of the Court in respect of any substantial relief sought in the action. In that respect the action must still be regarded as one to which the Crown is not a party. It is obvious, therefore, that the interposition of the Court must be confined to such relief as may be awarded in the absence of the Crown as a party to 30 the record.

A long line of decisions has settled that an action to declare void a patent for land, on the ground that it was issued through fraud or in error or improvidence, may be maintained, and that measure of relief granted, at the suit of an individual aggrieved by the issue of such patent, and to such an action the Attorney-General as representing the Crown is not a necessary party: *Martyn v. Kennedy*, (1853) 4 Gr. 61; *Stevens v. Cook*, (1864) 10 Gr. 410. See also *Farah v. Glen Lake Mining Co.*, (1908) 17 O.L.R. 1.

But in such cases the relief is limited to declaring the patent void, 40 leaving the parties to stand to one another as if the patent had never issued, their final rights in respect of the land being left to be determined and settled by the Crown, to which the lands are restored by the avoidance of the patent.

The Court is not called upon, and, in the absence of the Crown as a party to the record, cannot be called upon, to exercise the jurisdiction

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which is vested in it by sec. 26 (7) of the Judicature Act, R.S.O., c. 51, to decree the issue of Letters Patent from the Crown to rightful claimants. It is not necessary to enter upon a discussion as to the powers possessed by the Court under this provision, or to consider whether it applies to Letters Patent granting Crown lands, for in this case the record is not so framed or constituted as to parties as to enable such relief to be granted. Nor, in the absence of the Crown, can the Court undertake to make any declaration as to the ultimate title or right of the plaintiffs, for the reason that no such declaration could have any binding effect upon the Crown's rights in the premises. The utmost to which the Court should go 10 in this direction is to inquire into the plaintiffs' claim to the extent necessary to ascertain whether they have reasonable ground for invoking the jurisdiction of the Court to declare the patent void in whole or in part as having issued through error or improvidence: *Farmer v. Livingstone*, (1883) 8 S.C.R. 140. Fraud is not alleged or proved in this case.

The Court, being satisfied that the plaintiffs have shewn an interest in the land existing before and at the time of the issue of the Letters Patent [*Mutchmore v. Davis*, (1898) 14 Gr. 346, in the Court of Error and Appeal (1868)], which *prima facie* appears to entitle him to obtain a grant thereof from the Crown and that the defendants' Patent issued either 20 through error or improvidence, may sweep it out of the way and restore the status quo.

But it cannot be expected that on this record the Court will go further and adjudge as to the respective titles of the Crown, the plaintiffs or the defendants.

The next question then is, has it been made to appear that at the date of the issue of the Letters Patent to the defendants, the plaintiffs were possessed of or entitled to such an interest in the portion of the patented lands claimed by them as entitled them to ask the interposition of the Court in their favour? The learned Trial Judge did not pass upon this 30 question. The defendants dispute the plaintiffs' status and present a number of objections, some of which are formidable, if not insurmountable. They point out that the plaintiffs' interest, if any, is that claimed by their assignor, W. J. Green, as a prospector and explorer holding a miner's license by virtue of an alleged discovery of valuable ore or mineral in place under the waters of Cobalt Lake, and they say that at the time of the alleged discovery neither Green nor any one working for him held a miner's license, and that Cobalt Lake was withdrawn by the Lieutenant-Governor in Council from sale, location, or exploration, under the provisions of the Mines Act, and that Green and those associated 40 with him were aware of that fact, or could have ascertained the fact if they had made proper inquiry, but they deliberately refrained from doing so; that whatever may have been done in the way of exploration or discovery was done without the authority of a miner's license, and was conducted in direct contravention of the prohibition of the Mines Act against exploration on lands of the Crown withdrawn from sale, location or ex-

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ploration, and any supposed discovery made under such circumstances conferred no right to a mining claim under the Act. The defendants say, further, that no discovery of valuable ore or mineral in place was actually made, and that the provisions of the Mines Act and the regulations made thereunder with regard to discovery, staking, proof of claim and inspection, were not complied with, and the claim was never presented, recorded or inspected, in such manner as to entitle Green to assert under the Act any title to a mining claim situate under the waters of Cobalt Lake, or to confer on him any right thereto. The defendants further say
 10 that upon presentation of the claim for record in the office of the Mining Recorder, it was rightly rejected by the recorder, because it purported to be a claim of discovery in Cobalt Lake, which was not open for exploration, and because he was under instruction not to receive claims in respect of it; that his action was confirmed by the officers of the Bureau of Mines, and that the Minister of Lands, Forests and Mines rejected the claim for the same reasons.

Now, in order to obtain the recognition by the Crown of a right in respect of a mining claim, it was incumbent on the claimant to place himself in the position of one who had fully or substantially fulfilled all
 20 the requirements of the Mines Act and the regulations thereunder.

The primary requisites at the date of the alleged discovery were the possession of a miner's license and discovery made on Crown lands not withdrawn from location or exploration; Mines Act, R.S.O. (1897), cap 36, sec. 9 and secs. 45, 46 and 47, as amended by the Act 61 Vict. cap. 11, secs. 1 and 2. Section 9 reads that "any person" may explore for minerals on any Crown lands . . . except such as may have been withdrawn from sale, location or exploration; but a reference to the other sections shews that the person spoken of is a person holding a license. See also the regulations approved by Order in Council of 5th April, 1905, clauses 1, 12,
 30 13, 15 and 16.

It is plain that the explorations leading to the alleged discovery were all made before Green or any one assisting him in the work had procured a miner's license, and it was not until they believed themselves to be on the eve of a discovery of valuable mineral that the withdrawal of a core from the diamond drill was suspended until a miner's license was hurriedly obtained. Then, when the withdrawal was actually made, no inspector was present to verify the core as one bona fide taken from the place, though probably the omission to have an inspector there might have been remedied later on by the withdrawal of another core in the presence of an
 40 inspector. But even assuming the regularity of these proceedings, they could be of no avail to create rights if the land was withdrawn from location or exploration: sec. 47. Whether it was or not depends on the true construction of three Orders in Council of 14th and 21st August and 30th October, 1905, as reflected in the light of an Act of the Legislature, 6 Edw. VII. cap. 12.

Section 33 of the Mines Act (R.S.O. 1897 cap. 36) provided that where a part or section of the province was shewn or reported to be rich

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in mines or minerals, the Lieutenant-Governor in Council might withdraw the whole or a portion thereof from sale or lease, and set the same apart pending an exploration thereof or the prospecting of veins, lodes or other deposits of ores or minerals therein by the use of a diamond drill or otherwise, under the direction of the Commissioner of Crown Lands (now the Minister of Lands, Forests and Mines), and might fix the price or offer the same for sale by public auction.

The Order in Council of 14th August, 1905, directed that—together with other specified property of the Crown—"the lakes known as Cobalt and Kerr Lakes, situated in the township of Coleman, be withdrawn from exploration for mines and minerals and from sale, lease or location." This treatment of Cobalt Lake, as well as previous dealings in regard to portions of it, seems to import the view that the provisions of the Act and of the regulations with regard to discovery, staking, proof of claim, recording, etc., were thought to be applicable to lands covered by a large body of water, and not confined to surface lands. Unquestionably such provisions as those relating to the planting and maintenance of discovery and marking posts cannot be satisfactorily complied with so as to insure permanence where deep water covers the land upon which the discovery is said to have been made. Where, as in this instance, the posts were merely planted in the ice, all traces of the point of discovery and of the supposed boundaries of the claim are obliterated with the breaking-up of the ice. 20

The Order in Council, however, left no doubt as to the intention of the Crown with regard to the lakes mentioned, viz., that they were not to be subject to exploration for mines or minerals. By means of it, at all events, they were made prohibited territory for explorers and prospectors, and were also removed from the list of lands open for location, lease or sale. While that prohibition existed, it was not open to any person to make a discovery upon which he could validly maintain a claim under secs. 26 to 33, having regard to secs. 9, 33, 46, 47 and 48 of the Mines Act. And this quite apart from the difficulties, some of which have already been alluded to, surrounding the marking of the place of discovery, the placing of permanent posts shewing the boundaries of the claim and the proof thereof for purposes of recording. 30

The Order in Council of 28th August, 1905, after setting forth that the townships of Coleman and Burke, Lorraine and Hudson, in the district of Nipissing, were shewn to be rich in ores and minerals, directed that such parts of the said townships as had not already been leased or sold be "withdrawn from sale and lease" under the Mines Act, and be set apart under sec. 33—not interfering with the rights of any one who had theretofore made applications for mining lands in the said townships. No specific mention is made of Cobalt and Kerr Lakes, which had been specially dealt with by the Order in Council of 14th August. 40

There is nothing in the Order in Council of 28th August to indicate an intention to supersede the prior order as regards the withdrawal of these lakes from "exploration for mines and minerals." To that extent,

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Show you're wrong

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at all events, the first order was left to its operation on these lakes, and, while the unsold and unleased parts of the township were placed under sec. 33, the lakes still remained withdrawn from exploration, and so under the prohibition contained in secs. 9 and 47.

The Order in Council of 30th October, 1905, dealt only with the effect of the Order in Council of 28th August. Its purpose was to enable licensed miners to do what was requisite in order to acquire a mining claim upon any of the open lands in the township, and to record it, subject to the specified conditions and restrictions. But it did not authorise or assume to authorise the receiving or recording of a mining claim in respect of a part of the township which was withdrawn from exploration, and was, therefore, still under the prohibition of secs. 9 and 47. The testimony of Mr. G. T. Smith the Mining Inspector and Recorder for the district, supports the view that this was the intention. He shews that he received his instructions from the Department or Bureau of Mines that the lakes were withdrawn from exploration, accompanied by a copy of the Order in Council, on or about 18th August, 1905, and those instructions were never afterwards countermanded; that no claim was thereafter presented to him for record until 8th March, 1906, when Green's was presented and he declined to receive or record it because Cobalt Lake was withdrawn from exploration.

As to this the learned Trial Judge says: "It is plain that the inspector considered that Cobalt Lake was not open for prospecting, and that the same opinion was shared by the officers of the department, including the Minister," and this appears to be a fair and proper inference from the facts and circumstances in evidence.

Strengthening this view is the Act of the Legislature, 6 Edw. VII., cap. 12, by sec. 1 of which it is enacted that the Order in Council of 14th August, 1905, is confirmed and declared to have been and now to be binding and effectual for the purposes therein mentioned. This Act received the assent of the Lieutenant-Governor on 14th May, 1906, rather more than two months after the refusal to record the claim on which the plaintiffs rely, and it is argued that effect should not be given to it to their prejudice. In view, however, of the actual situation before and at the time when Green and those associated with him assumed to make explorations on Cobalt Lake, their course of conduct is difficult to understand. Assuming that it was the intention that Cobalt Lake should continue and remain withdrawn from exploration, an inquiry from the Department or the Bureau of Mines or from the Inspector and Recorder of the District, whether that was the case, would have elicited an affirmative answer. But according to Green's testimony, he appears to have deliberately refrained from addressing the question to any one. He is described in the statement of claim as a broker, but from his testimony it appears that for some time he practised law, and had acquired a good deal of experience in mining law. In January, 1906, he consulted a legal gentleman practising law in Toronto about forming a syndicate to prospect at Cobalt. He was

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introduced to a Major Gordon, and there was a discussion about the chances of finding mineral on Cobalt Lake, and Gordon said he was certain he could find a vein of mineral in the lake. Green then went to the Bureau of Mines and inquired for information relating to the Cobalt district. He saw one of the clerks, a young woman, and was given several pamphlets, one or two mining reports and the rules and regulations. He told the clerk that he wanted all the information they could give him relating to the Cobalt district. She handed him the pamphlets and told him that everything was contained there, except a map of what claims or sections were open for location, but that he would find the map probably at the 10 Recorder's Office at Haileybury. He then went to Haileybury to the Mining Recorder's Office and saw a young woman clerk in charge of the office. He asked for a map shewing what claims were open for location, and was handed a map of claims shewing sections marked. On the map appeared sections marked with a capital "A." The clerk told him the sections so marked indicated the sections applied for. From the rules and regulations and the map, he says, he came to the conclusion that Cobalt Lake was open for exploration. He and Major Gordon then set up a diamond drill on Cobalt Lake and worked there for some weeks. Neither of them had a miner's license. On cross-examination he said that when he 20 went to the Bureau of Mines he didn't see the Minister or his Deputy. He did not think it was necessary to see anybody who was appointed to give out information. He did not make any inquiry at that time as to whether or not Cobalt Lake was open. He made no special inquiry about Cobalt Lake; simply asked for the literature and all information. He made no inquiry about Orders in Council. He made no special inquiries at Haileybury about Cobalt Lake. He asked the clerk at Haileybury if the map was up to date, and she replied "Yes." She said it was made up every two or three days. He merely asked her the question, "Is this up to date?" and she said "Yes." He did not direct her attention to Cobalt 30 Lake, nor mention any special place where he was going to prospect. Then, without more, the diamond drill was placed on the ice and operations were begun in Cobalt Lake.

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Now if Green was misled, he had only himself to blame. A plain, direct question either at the Bureau of Mines or Haileybury would have undoubtedly elicited the information that Cobalt Lake was not open for prospecting. But, evidently to suit his own purposes, he did not desire to put the direct question.

There was nothing misleading in the information he did obtain. The regulations were, of course, applicable to all mining districts. The first 40 clause directs attention to the fact that no exploring is to be done on lands withdrawn from "sale, location or exploration." And clause 16 repeats verbatim the proviso of sec. 47 of the Act against marking or staking a mining claim on Crown lands withdrawn from location or exploration. The map furnished him shewed a condition entirely consistent with the intention and practical working of the Orders in Council of 14th August

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and 30th October. The sections or lots actually applied for out of the parts of the township in respect of which the Order in Council of 30th October authorised the Recorder to record claims, were marked on the office map from day to day as they came in, and it is not suggested that the map was inaccurate. A frank question would have led to a full explanation, but for some mysterious reason it was not asked.

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In these circumstances the plaintiffs have nothing to blame the Department or Bureau of Mines for. They present no valid ground or reason for saying that effect should not be given to the intention of the Crown 10 with regard to Cobalt Lake. It follows that what was assumed to be done by Green and his associates by way of exploration and alleged discovery, marking and staking, did not create a right to a mining claim under the Mines Act. That being so, it is hardly necessary to say that what is shewn to have been afterwards done or attempted to be done by them in the way of insisting upon recognition of the claim, is immaterial, and need not be considered. The Crown never receded from the position which was taken on its behalf the moment Green's claim was presented, that Cobalt Lake being withdrawn, there was no claim to be considered. And afterwards, 20 acting under the authority of ~~sec.~~ 33 of the Mines Act, a sale was made to the defendants. The result is, that the plaintiffs have no status to impeach the sale or the Letters Patent issued in pursuance thereof.

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On these grounds the judgment appealed from should be upheld. But, if these grounds should not prevail, there still remain the questions as to the defendants' position as purchasers for value, and as to the effect of the Act of the Legislature, 7 Edw. VII, cap. 15.

That the defendants became the purchasers in good faith and for value the evidence leaves in no doubt. Apparently they had no notice of the plaintiffs' claim until after the acceptance of their tender and payment of the deposit, but before the payment of the balance of the purchase money 30 and the issue of the letters patent, they were aware that the plaintiffs were claiming the portion of Cobalt Lake in respect of which this action is brought.

And assuming that the plaintiffs were able to establish a status entitling them to impeach the sale, the defendants would derive no protection from the plea of purchasers for value without notice.

But they would still be entitled to the benefit of the Act 7 Edw. VII. cap. 15.

Many objections have been urged with much force and ability against the constitutional validity and the legal effect of this Act.

40 It is impossible, however, to conclude that it is a private and not a general Act, and that it was not intended to validate and confirm the sale and grant of the lands comprised in the Letters Patent, and of all the mines and minerals being and lying in and under the lands and all mining rights therein and thereto and to vest the property therein and thereto in the defendants as and from the date of the sale, absolutely freed

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from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location or staking. Having regard to what is known to have transpired before and up to the time of the passing of the Act, it is not possible to ignore the significance of the enactment, or to seek to treat it as inapplicable to the plaintiffs' asserted claim to impeach the grant to the defendants. And, unless the enactment was beyond the legislative authority of the Legislature, it must be taken as absolutely concluding any claim to the lands to which the plaintiffs assert title in this action.

It was urged that the legislation was ultra vires and incompetent, because it was enacted during the pendency of this action, and its effect, if valid, is to usurp the functions of the Courts and to declare the rights of individuals in property in derogation of the ordinary law of the province. 10

But the subject matter of the enactment falls clearly within the category of property and civil rights. The right claimed by the plaintiffs is, if anything, a right in property within the Province. So the right to bring an action is a civil right. And both have, by sec. 92 of the British North America Act, been made subject to the legislative authority of the Provincial Legislature. And where there is jurisdiction over the subject matter, arguments founded on alleged hardship or injustice can have no weight. 20 As said by Lord Herschell in *Attorney-General of Canada v. Attorney-General of the Provinces* (1898) A.C. 700, when discussing the question of the relative legislative powers and authority of the Parliament of Canada and the Legislatures of the Provinces under the British North America Act (p. 713): "The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limits upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom 30 the Legislature is elected." Lord Herschell added: "If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by sec. 91." But this latter remark was made in relation to the respective powers and property rights of the Dominion and the Provinces, and has no application to a case like the present, where the lands were Crown lands, the property of the Province.

Even supposing the opinion of a Court to be that the Letters Patent issued in error and improvidently, the Act must still remain as a legislative declaration of the validity of the sale. And in that respect the Act would form a bar to the plaintiffs' alleged rights. 40

Another point, not however raised by the pleadings or argued in the Court below, was suggested upon the argument of the appeal. It was contended that the grant to the defendants did not comprise or carry with it a

grant of the precious or "Royal" metals. The grant is of the land covered with water composed of Cobalt Lake mining location, together with the mines, minerals and mining rights thereon and thereunder.

The Mines Act, R.S.O. (1897) cap. 36, sec. 2 (6), defines mining rights as meaning the ores, mines and minerals on or under any land where the same are dealt with separately from the surface of the land: see also the Mines Act, 1906, sec. 2 (9), (10) and (12). Here the Letters Patent are issued subject to the provisions of secs. 188 to 221, inclusive, of the Mines Act, 1906, and there is a grant both of the land and of the mining rights, 10 as well as of the mines and minerals thereon and thereunder; words which, having regard to the nature of the territory and the purposes of the grant, seem broad and comprehensive enough, one might suppose, to justify a construction that would include metals and minerals of every description. Sections 3, 4 and 5, of the Mines Act, R.S.O. (1897), cap. 36, and secs. 2 (16) and 3 (1) and (5) of the Mines Act, 1906, seem to indicate an intention to withdraw from the Crown any right under its prerogative title to the precious metals. But if this be not so, the plaintiffs' case is not thereby advanced, for their claim, if any, is under the Mines Act, R.S.O. (1897), cap. 36, and any grant to them would not be more extensive 20 in terms or effect than the grant made to the defendants. However, the point is not properly open to the plaintiffs on this appeal.

There may be a question whether the plaintiffs are entitled to maintain this action as assignees of Green. Section 47 of the Mines Act, R.S.O. (1897) cap. 36, enables a licensee, who has discovered a vein or other deposit of ore or mineral, to mark or stake out a mining claim, providing that it is on Crown lands, not withdrawn from location or exploration, and "to transfer his interest therein to another licensee."

This appears to be the only provision in force when the transfer was made to the plaintiffs, enabling a discoverer to transfer his interests to 30 another. He does not appear to be authorised to make a transfer of a mining claim arising in respect of Crown lands withdrawn from exploration. The question whether, assuming that Green did acquire mining rights in or under Cobalt Lake, notwithstanding that it was withdrawn from exploration, he could make a valid transfer of such rights so as to enable his transferee to maintain an action in respect of them, was not raised or discussed, and it is not necessary to the disposal of the appeal that it should be considered.

The appeal must be dismissed.

GARROW and MACLAREN, J.J.A., concurred.

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In the Court of Appeal for Ontario.

Monday, 5th day of April, 1909.

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PRESENT:

*In the
Court of
Appeal for
Ontario.*

No. 51
Certificate
of Court
of Appeal
for
Ontario,
5th April,
1909.

The Hon. The Chief Justice of Ontario.
The Hon. Mr. Justice Garrow.
The Hon. Mr. Justice Maclaren.

[Stamp \$2.90.]

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,
(Appellants) PLAINTIFFS;

AND

10

THE COBALT LAKE MINING COMPANY, LIMITED,
(Respondents) DEFENDANTS.

THIS IS TO CERTIFY that the appeal of the above named appellants from the Judgment of the Honourable Mr. Justice Riddell of the High Court of Justice for Ontario pronounced on the 15th day of June, 1908, having come on to be argued before this Court on the 5th and 8th days of February, 1909, whereupon and upon hearing counsel as well for the appellants as the respondents, THIS COURT WAS PLEASED TO DIRECT that the matter of the said appeal should stand over for judgment, and the same having come on this day for judgment:

20

IT WAS ORDERED AND ADJUDGED that the said appeal should be and the same was dismissed with costs to be paid by the appellants to the respondents, forthwith after taxation thereof.

Court of Appeal Seal.

"N. F. PATERSON,"
"Registrar"

Entered O.B. XI.

Issued 10th May, 1909,
"C.S.G."

IN THE COURT OF APPEAL FOR ONTARIO.

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Ontario.*

No. 52.
Order
allowing
appeal from
judgment of
Court of
Appeal for
Ontario.
Order dated
8th Oct.,
1909.

The Honourable the Chief Justice of Ontario, in Chambers. Friday, the 8th day of October, A.D. 1909.

BETWEEN:

THE FLORENCE MINING COMPANY, LIMITED,
(Appellants) PLAINTIFFS,
AND

THE COBALT LAKE MINING COMPANY, LIMITED,
(Respondents) DEFENDANTS.

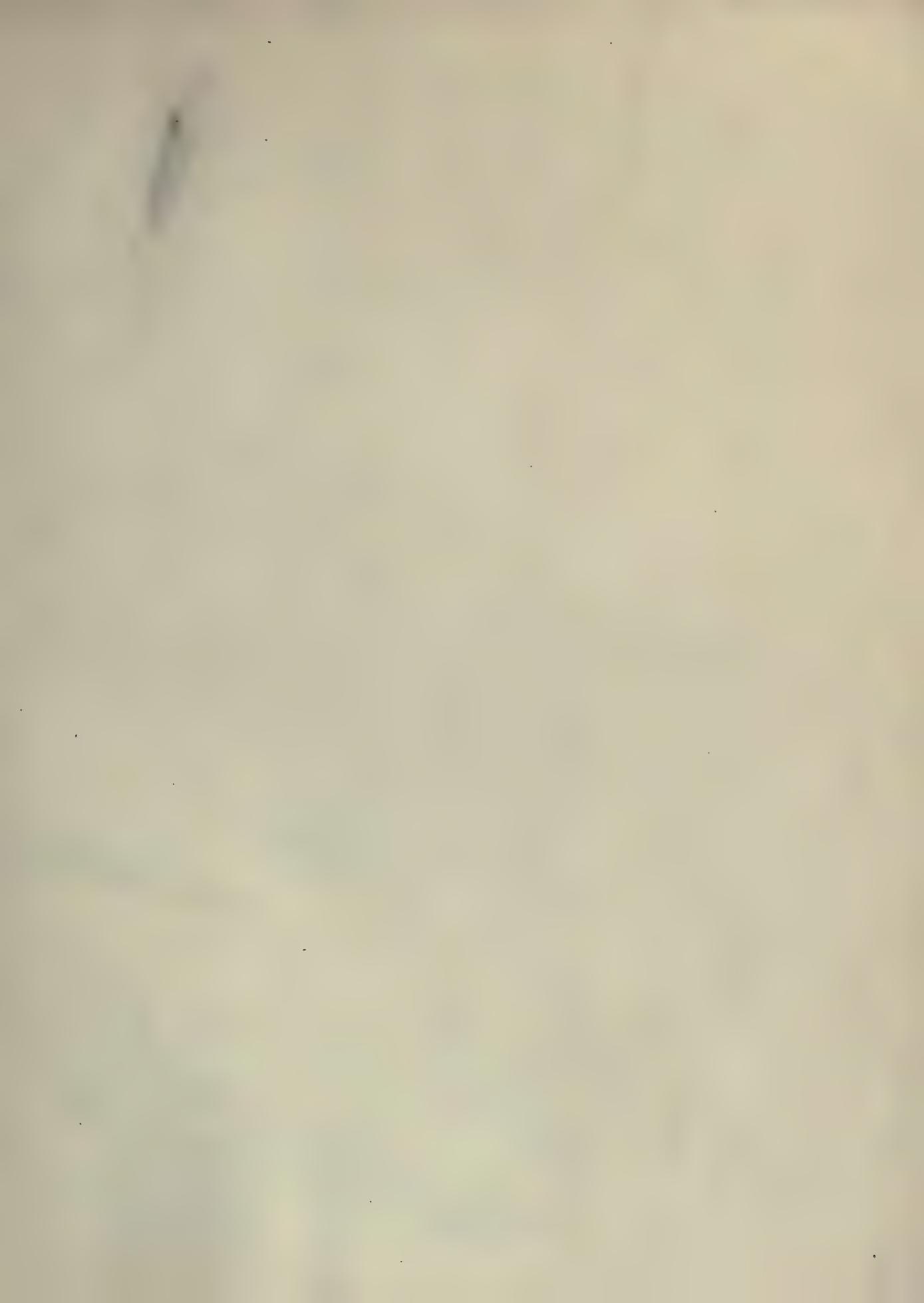
10 UPON the application of the above named appellants and upon hearing read the pleadings and proceedings herein, the Appeal Book and the affidavit of John Murray Clark filed and the notice of application to fix the amount of the security to be given by the appellants on the appeal to His Majesty in His Majesty's Privy Council and to allow the said appeal, and upon hearing counsel for all parties, and it appearing that the said appellants have paid into Court herein the sum of two thousand dollars to secure the costs of the respondents on said proposed appeal and it further appearing that the case is one which is appealable to His Majesty in Council, and upon hearing what was alleged by counsel aforesaid,

20 1. IT IS ORDERED that the said security be and the same is hereby approved and that the said appeal be and the same is hereby allowed.

2. IT IS FURTHER ORDERED that the costs of this application be -
costs in the appeal to His Majesty in His Majesty's Privy Council.

Entered O. B. XI.
Issued 8th Oct., 1909.

(Sgd.) N. F. PATERSON,
Registrar.



In the Privy Council. No. of 1909

On Appeal
from the Court of Appeal for Ontario

BETWEEN

THE FLORENCE MINING COMPANY
LIMITED,

(Plaintiffs) Appellants

AND

THE COBALT LAKE MINING COMPANY
LIMITED,

(Defendants) Respondents

RECORD OF PROCEEDINGS.

LAWRENCE JONES & CO.,

4 St. Mary Axe, E.C.,

Solicitors for Appellants.

CHARLES RUSSELL & CO.,

37 Norfolk St., Strand,

Solicitors for Respondents.

Collected & also open.

Permit to mine act 1897 ch 36
Permit to other acts

Public Lands act

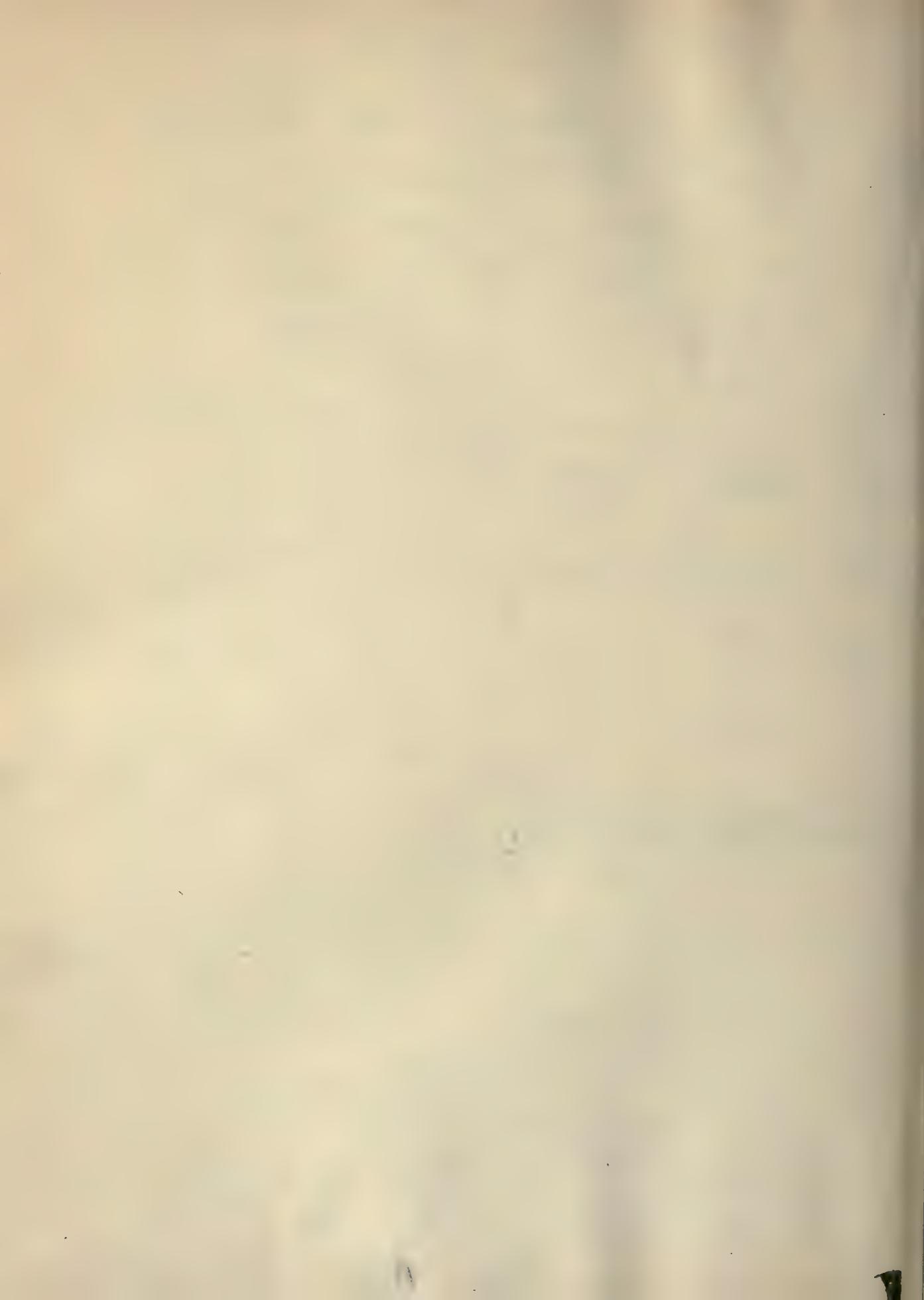
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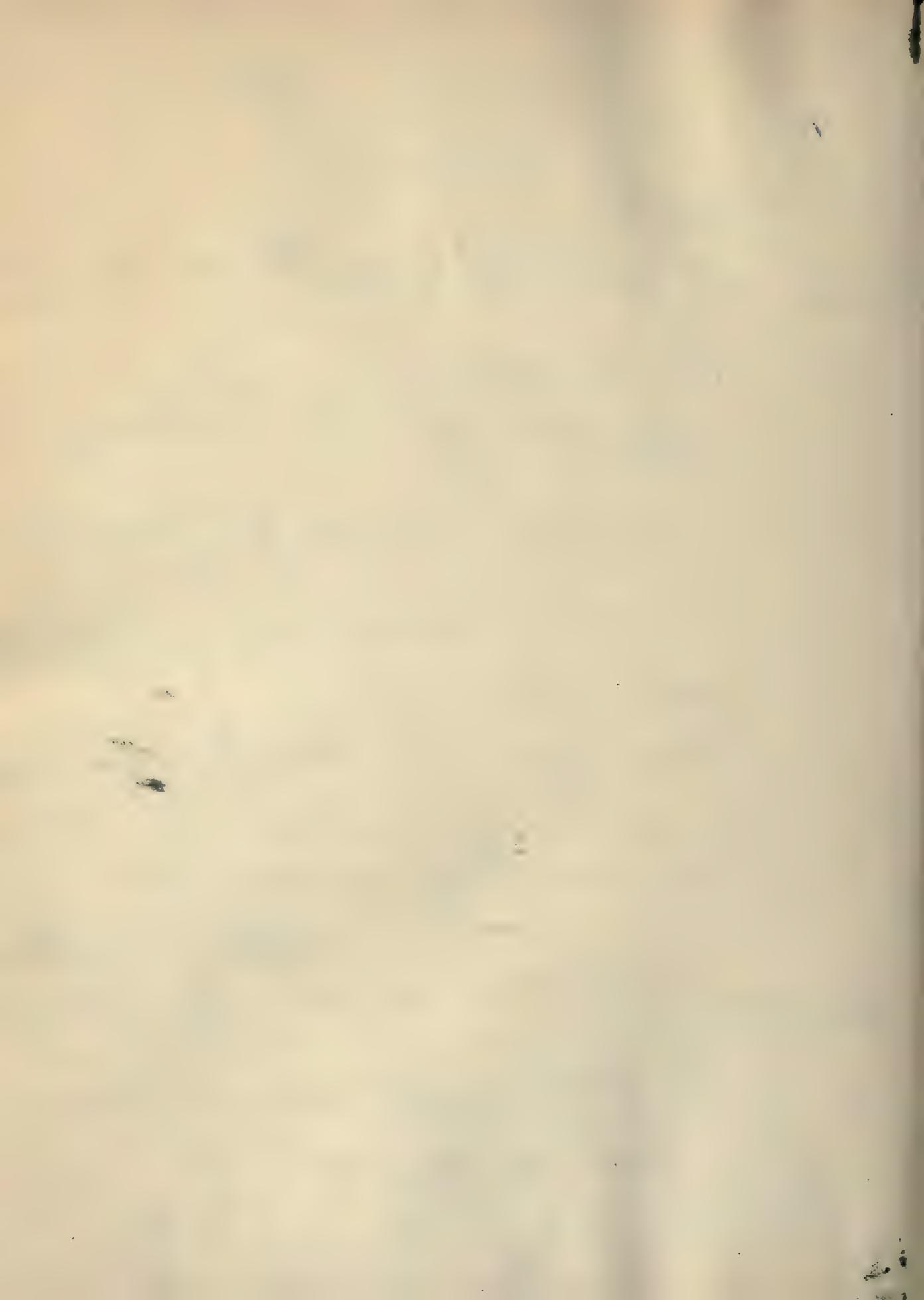
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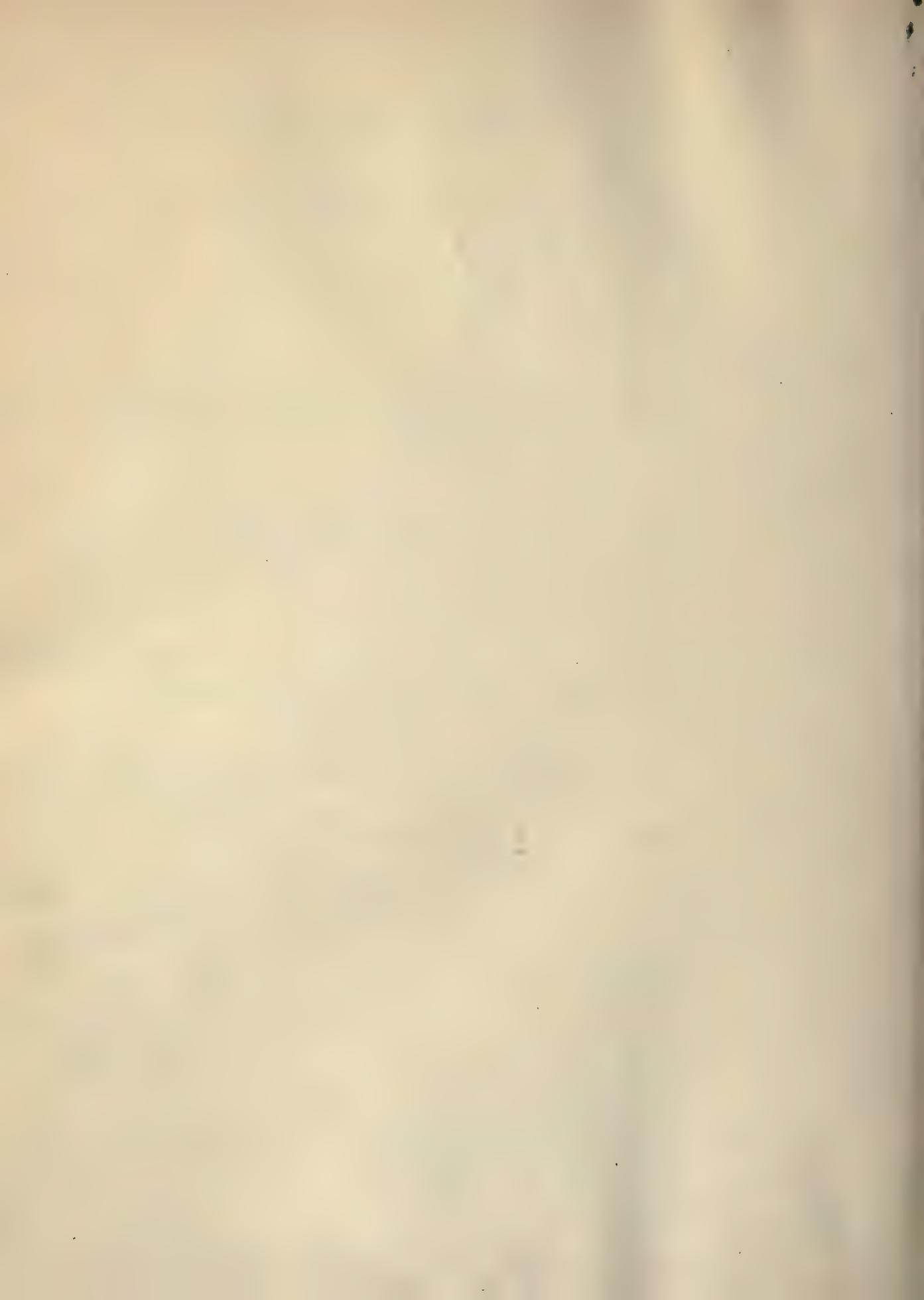
Sec 91 of Act of 1897
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Sec 33 of same act
Advantage of Queen's discovery

discusses p 89 & 90

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Prerogative

Act of 1906. passed

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Passing of O.C.

Claims before 14 Aug 1905

Claims left intact

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not under any
of rights

but a Private Act

Interpretation Act

ss 98

Claim referred to

Claim in value claimant

Sec 33 of Act of 1897

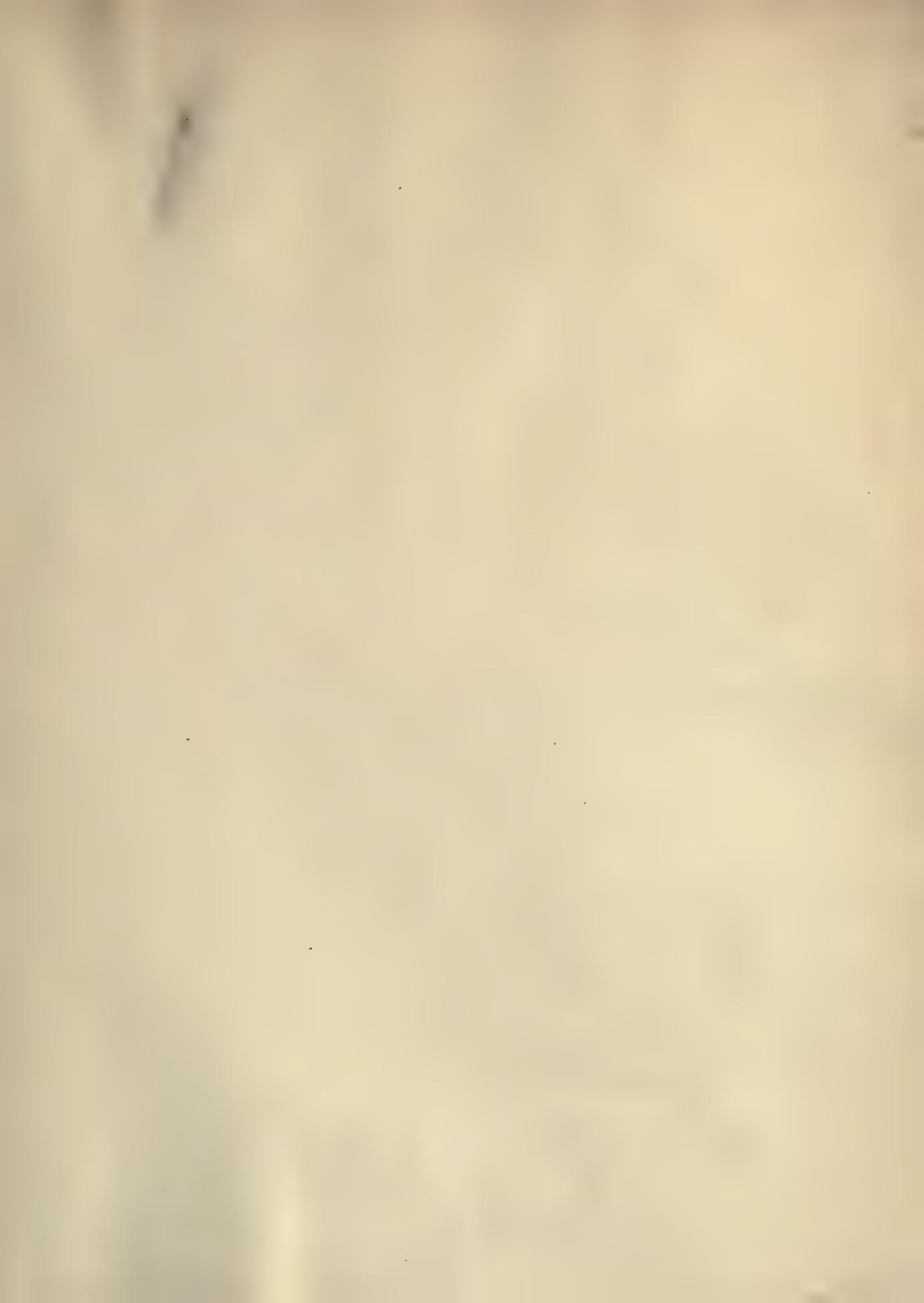
Replaced by Miss. Ad 1906

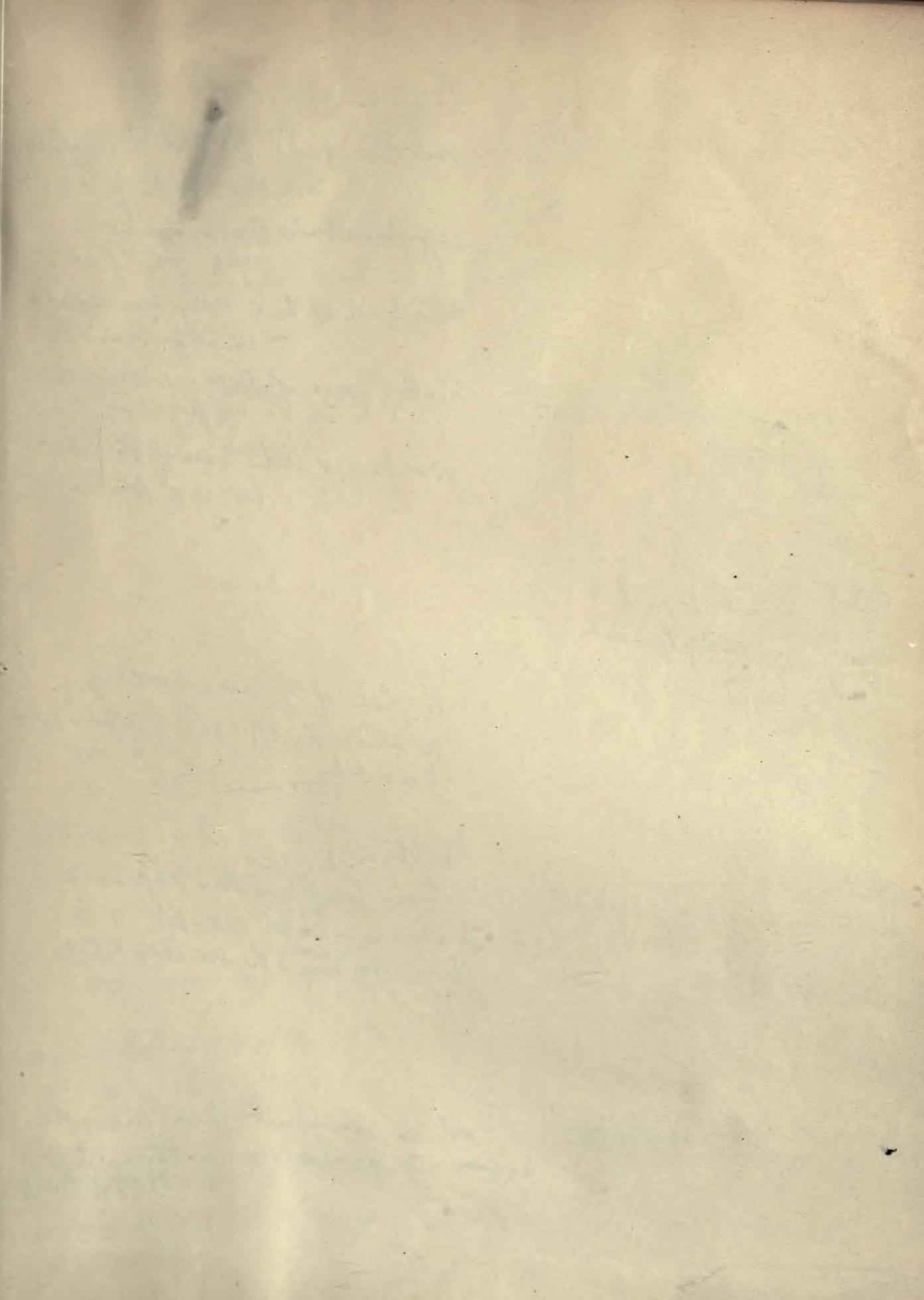
Such confirmed by
Act of 1907

justify - My friend said
that things
starting with ^{word} _{value}
suit by Atty Gen.

Answer

late authorities





Cases to have in court

try you a party.

John von Linne Dalmatia (1808) 170. 4.R. 1
L. M. Co. v. Gray bull

Previous Metals

Unit v Seybold 31 And R 386 (1939)
1903 A.C. p73

Esquimalt - v Bainbridge
1896 AC 561

Atty Gen. B v Atty Gen Canada
14 At. L. Cas. 295-

atty Gen of Ill v Moran
8 Apr 1967

Worley v Atty Gen of the doone
(1877) 2 Ap Cas. 163

1896 A C 240 at p 243

Right of Discovery.

Wade v. Hall (1883) 8 Apples. 195
Bainbridge on Minn. 5th 120
(Crown brand)

Ultra Vius

Dohie v Temporalities 7 A.P.Cas. 136
Fisher v Case 1898 A.C. 448
Chang Hon Kee v Piffott 1909 A.C. 512

of M to Justice
own Gramma v Day 1908 A C 504
all of Wi Matua 1908 A. C. 448

industrial Power
Hamilton M.W. Ry Co. 39 UC QB 93

Wine Creek Dm. prevails
between the Franklin & Continental Hds.
1909 A.C. 184

TP

Statutes to have in Court
1892 55 Vict (Cont) ch 9.

R.S.O (1897) Vol I

1898 61 Vict (Cont) ch 11

62 Vict (") ch 10

1906 63 Vict (Cont) ch 11
(Report of Min of Just in other)
1907 7 Edw VII

Interpretation of Sl
of Queen v. Queen Reg Co
105.C.R. 563 & p 582
Queen v. Pawn 5 Hanc 418
Hans Stephen v. 3 B & P. 565
+ Hyacinth case 255.C.R. 173

R.R. Parker 1899 A.C. 545
vol. 1
Johnstone & Hill 6 A.C. 208

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Florence Mining Company, appellant
In the Privy Council, No. 13 of 1910.

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